Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SL SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 50% duty on "expenses of repairs" performed in foreign shipyards that is imposed by the federal vessel repair statute applies to expenses (such as dry-docking) that are not actual repair expenses, and would have been incurred even if no repairs were performed.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is CSX Corporation and that no other publicly held corporation owns 10 percent or more of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SL Service, Inc. ("SL Service") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit is published at 357 F.3d 1358 (2004) and appears in the Appendix of this Petition ("App.") at 1a-12a. The Federal Circuit's unpublished order denying the petition for rehearing and rehearing *en banc* appears at App. 22a-23a. The opinion of the Court of International Trade granting summary judgment on behalf of SL Service is published at 244 F. Supp. 2d 1359 (2002) and appears at App. 13a-21a.

JURISDICTION

The court of appeals entered judgment on February 4, 2004, and denied a timely petition for rehearing on April 12, 2004. This Court extended the time for filing a petition for certiorari to and including August 10, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The federal vessel repair statute is codified at 19 U.S.C. § 1466 and is reproduced at App. 24a-28a.

The Customs Service regulations implementing the vessel repair statute appear at 19 C.F.R. § 4.14 and are reproduced at App. 29a-39a.

STATEMENT OF THE CASE

This case presents an important question of federal law with serious implications for the U.S.-flag shipping industry. A divided United States Court of Appeals for the Federal Circuit has impermissibly broadened a 19th-century tariff statute in a way that flouts the letter and the spirit of the statute and departs from a century of Customs Service practice. Moreover, the Federal Circuit's new interpretation of the statute is arbitrary and directly contravenes that court's own prior interpretation announced just a decade ago. The substantial additional, unwarranted duties that U.S.-flag ships will have to pay as a result of the decision below will further weaken an American merchant marine industry already laboring under severe competitive disadvantages. The decision of the Federal Circuit thus warrants this Court's review.

Industry Background

The U.S.-Flag Fleet. The U.S.-flag commercial fleet is vital to the strength and security of the nation. In addition to the economic importance of the merchant shipping industry, the U.S.-flag fleet fills the strategic need for an American-owned marine transportation system (without which U.S. importers and exporters would be wholly dependent on foreign interests) and serves as a naval and military auxiliary in times of war and emergency.[1] These important national interests

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[1] U.S.-flag ships, manned by American civilian mariners, play a central role in staging and supporting military operations, providing the sealift capacity needed to undertake and sustain an overseas engagement. See U.S. Mar. Admin., *Maritime Security Program*, *available at* http://www.marad.dot.gov/programs/msp/msp.html (last visited Aug. 10, 2004). The Defense Department simply is not capable of effecting the necessary cargo movements at a bearable cost. For instance, nearly half of the cargo for the 1991 Persian Gulf War was carried on U.S.-flag ships crewed by civilian mariners. See H.R. Rep. No. 104-229, at 10 (1995), *reprinted in* 1996 U.S.C.C.A.N. 3521, 3522. Relying on foreign-flag vessels to meet the sealift needs of the military during wartime would place vital supply lines in the hands of foreign interests, presenting obvious and

depend on the regular operation of commercial vessels flying the American flag, a reliable pool of trained civilian mariners to man them, and the ability and willingness of the private maritime industry to make the necessary capital investments.

For these reasons, it has long been a staple of federal policy "to develop and encourage the maintenance of a merchant marine." Act of June 5, 1920, § 1, ch. 250, 41 Stat. 988, 988. As Congress declared in the landmark Merchant Marine Act of 1936,

> [i]t is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel.

46 U.S.C. app. § 1101. The policy remains unchanged today, as evidenced by the Maritime Security Act of 1996, Pub. L. No. 104-239, 110 Stat. 3118, enacted to "assure the retention by the United States of an active, privately owned, U.S.-flag and U.S.-crewed merchant shipping fleet to meet national and foreign commerce needs and to provide sustainment sealift capability in time of war or national emergency." H.R. Rep.

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unacceptable risks. See Raymond J. Decker, U.S. GAO, Rep. No. GAO-03-15, *Actions Needed to Improve Force Protection for DOD Deployments Through Domestic Seaports* 8 (Oct. 22, 2002). The merchant marine also has important frontline roles in detecting and preventing threats to port security. See, *e.g.*, Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 101(13), 2002 U.S.C.C.A.N. (116 Stat. 2064) 2067 (codified at 46 U.S.C. § 70101 note).

No. 104-229, at 9 (1995), *reprinted in* 1996 U.S.C.C.A.N. 3521, 3521.

But the fleet is waning. From its heyday after World War II when the U.S.-flag merchant fleet carried nearly half the world's seaborne cargo, the fleet has steadily shrunk as cargo increasingly is shipped under flags of foreign countries offering tax incentives and lax regulations. From a post-war high of 1268 ships of at least 1000 gross tons in 1951, the private U.S.-flag fleet had declined to 237 vessels in 2003. U.S. Mar. Admin., *U.S.-Flag Merchant Fleet* (2003), *available at* http://www.marad.dot.gov/marad_statistics/US-Flag-History.pdf. In this environment, American shipping companies operate on razor-thin margins, which are squeezed by stark differentials in operating costs and regulatory burdens and by subsidies to foreign merchant fleets.[2] Increases in the cost of doing business can be devastating, driving some vessel owners out of the trade and slashing the already lean profits of those that remain. Investment capital has dwindled, with the predictable impact on operations and recruiting.

Among other disquieting concomitants of this trend, the civilian manpower and sealift capability for overseas military engagements have fallen to dangerously low levels. See *id.* Yet the strategic need for a viable U.S.-flag fleet is perhaps greater than in living memory. Given the extent of America's military commitment around the world, its unprecedented dependence on foreign trade for vital commodities, and the vulnerability of the nation's ports and related infrastructure, a vital U.S.-flag merchant fleet is not a luxury. In the words of the agency charged with overseeing the merchant marine:

> Ninety-five percent of the Nation's overseas trade moves by water, but only about three percent is carried by the

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[2] A U.S.-flag ship typically costs as much as $4 million more in annual operating costs than an identical ship flying a foreign flag. Robert Little, *Ships Without Sailors (pt. 2 of 2): U.S. Merchant Fleet Sails Toward Oblivion*, Balt. Sun, Aug. 6, 2001, at A1.

> U.S.-flag fleet. This has disturbing implications for America's national security and economic vigor. Without a U.S.-flag fleet, the Nation's foreign commerce and auxiliary sealift capability would depend entirely on foreign-flag ships.

U.S. Mar. Admin., *2002 Annual Report* 5 (2003).

In recognition of the continuing importance and the shaky condition of the flag fleet, Congress has acted several times in recent decades to enhance the fleet's competitiveness. In 1981, Congress granted shipowners temporary but vital relief from the requirement that government-preference cargo be shipped on U.S.-built vessels. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XVI, 95 Stat. 357, 751.[3] The Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67, created an enhanced antitrust exemption for conference rate-setting by U.S.-flag ship owners and sanctioned their participation in foreign consortia—protections augmented by the Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902. Also in 1984, Congress established a commission to "study problems relating to [the] . . . merchant marine" and to recommend remedial action. Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 1536(b), 98 Stat. 2492, 2633. When these piecemeal remedies proved unequal to the pressures on the merchant fleet, Congress in the Maritime Security Act of

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[3] Under the Cargo Preference Acts of 1904 and 1954, 100 percent of U.S. military cargoes, 50 percent of U.S. government non-military cargoes, and 75 percent of agricultural assistance exports must be carried on U.S.-built ships. *See* Military Cargo Preference Act of 1904, ch. 1766, 33 Stat. 518; Military Cargo Preference Act of 1954, Pub. L. No. 664, ch. 936, 68 Stat. 832; Food Security Act of 1985, Pub. L. No. 99-198, § 1142, 99 Stat. 1354, 1491-92. American shipowners took advantage of the 1981 dispensation to acquire more than 30 ships from foreign yards, a substantial and much-needed boost to the aging flag fleet. *See* Andrew Gibson & Arthur Donovan, *The Abandoned Ocean: A History of United States Maritime Policy* 257-58 (2000).

1996, Pub. L. No. 104-239, 110 Stat. 3118, created a regime of substantial operating subsidies.

Coast Guard Inspections. All vessels flying the U.S. flag are required to undergo regular examinations or inspections by the United States Coast Guard and the American Bureau of Shipping ("ABS").[4] See 46 C.F.R. §§ 2.01-10(b), 90.05-1(a), 91.01-1. Under Coast Guard rules, these examinations must occur at least two times in a five-year period, with no more than three years elapsing between any two examinations. See *Id.* § 91.40-3. These examinations require the vessels to be taken out of service for a period of time to be dry-docked, typically two weeks or more. *Id.*

Because of the high cost of dry-docking a large cargo ship and the substantial opportunity cost of having the ship out of commission, owners and operators of American-flag vessels commonly arrange for nonemergency repairs and modifications to be performed while a ship is in dry dock for Coast Guard and ABS inspections.

Over the years, it has become increasingly difficult and costly for American-flag vessels to schedule inspections at United States shipyards. Many domestic shipyards have shifted their work primarily or even exclusively to construction and repair of Navy and Coast Guard ships, with much of the remaining availability reserved for passenger cruise lines able and willing to pay top dollar. Consequently, fewer and fewer domestic shipyards have the docking capacity and scheduling to meet the requirements of large commercial ship

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[4] ABS is a private organization that certifies ships as seaworthy. Because it is required for insurance purposes, certification by a recognized entity (ABS is the second-largest, after Lloyd's Register in Britain) is effectively a prerequisite of modern commercial shipping. Under the Coast Guard's Alternate Compliance Program (*see* 46 C.F.R. pt. 8), ABS and certain others are delegated authority to inspect and certify U.S.-flag ships. Therefore, ABS inspections and Coast Guard inspections are usually one and the same.

owners. Sometimes no domestic shipyard is available or will even bid on a project; at other times, the only domestic yard that is available is markedly less efficient and more expensive than equivalent yards in most foreign ports—typically requiring at least 50 percent more time for a given job, at about triple the cost. In many cases, therefore, owners of U.S.-flag vessels have little or no choice but to contract with foreign shipyards to comply with Coast Guard and ABS inspection mandates.

The Vessel Repair Statute

The federal vessel repair statute imposes a 50 percent duty on the cost of repairs made in foreign countries on U.S.-flag vessels. The statute provides in relevant part that

> the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a). The statute was enacted in 1866 to aid a domestic shipbuilding industry that had been decimated by a perfect storm of Civil War casualties, war-panic divestments of merchant ships, and the rise of iron ships coincident with a steep tariff on iron and steel. See H. David Bess & Martin T. Farris, *U.S. Maritime Policy: History and Prospects* 23-24 (1981). Since then, the statute has been reenacted from time to time with modifications (primarily to ameliorate its impact on ship owners), but the language quoted above remains largely unchanged since the original enactment.

Self-evidently, one purpose of the statute is to protect the American shipbuilding and ship-repairing industry by encouraging the use of American shipyards for repairs to U.S.-flag vessels. See *South Corp.* v. *United States*, 690 F.2d 1368, 1372 (Fed. Cir. 1982) (en banc) ("In enacting § 1466(a) Con-

gress sought to protect and encourage American ship repair facilities."); *Erie Navigation Co.* v. *United States*, 475 F. Supp. 160, 163 (Cust. Ct. 1979) ("the purpose of section 1466(a) was to protect the American shipbuilding and repairing industry"); Duty on Repairs for American Vessels, 33 Op. Att'y Gen. 432, 434 (1923) (statute's goal is "to protect the American manufacturer of ship parts").

The statute's concern for shipbuilders and dockworkers, however, is balanced by a concern for the interests of ship owners and operators, and Congress has always taken care not to upset that balance. For example, the duty is not meant to apply where a vessel's return to the U.S. for repairs is impossible or impracticable. As originally enacted, the statute applied only to vessels "engage[d] in the foreign and coasting trade on the northern, northeastern and northwestern frontiers of the United States," thus excluding ships too far away practicably to return to the U.S. for repairs.[5] The modern equivalent of that limitation is an exemption for vessels that are at sea for two years or more. 19 U.S.C. § 1466(e). Also, the statute authorizes the remission of duties on the cost of foreign repairs occasioned by stress of weather or other casualties. *Id.* § 1466(d); see 19 C.F.R. § 4.14(h)(2).

And where the statute does apply, it does not reach all work performed in foreign shipyards. Costs associated with Coast Guard and ABS inspections, including work incidental to inspections, are not subject to duty. *Vessel Repairs*, 14 Cust. B. & Dec. 1061 (Cust. Serv. 1980); *Vessel Repair*, 13 Cust. B. & Dec. 1395 (Cust. Serv. 1979). Modifications, alterations, and additions to the hull and fittings of a vessel are not subject to duty. *Carriers*, 23 Cust. B. & Dec. 777 (Cust. Serv. 1989);

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[5] Act of July 18, 1866, ch. 201, § 23, 14 Stat. 178, 183-84. With this geographic limitation, Congress aimed to confine the burden to those vessels "that could most easily purchase and conduct repairs in the United States." Lawrence M. Hadley, Note, *The Fifty Percent Ad Valorem Duty on Foreign Ship Repairs: Scope of Application and Proposals for Elimination*, 24 Geo. Wash. J. Int'l L. & Econ. 415, 420-21 (1990).

see *United States* v. *Admiral Oriental Line*, 18 C.C.P.A. 137 (1930).[6] The statute expressly exempts from duty the cost of equipment, repair parts or materials for LASH barges, as well as the costs of spare parts and materials for which duties have been paid. 19 U.S.C. § 1466(h); see 19 C.F.R. § 4.14(h)(4); Customs Headquarters Memorandum No. 113291 from Stuart P. Seidel, Assistant Commissioner, Office of Regulations & Rulings, to All Vessel Repair Liquidation Units (May 31, 1995). Compensation paid to regular crew members in connection with dutiable repairs is also exempt. 19 U.S.C. § 1466(a).

At least once in recent years, a proposal to expand the reach of the vessel repair statute beyond repair costs was brought to Congress. In 1990, the Customs Service lobbied for an amendment to the statute that would have allowed Customs to collect duty on "all costs and expenses associated with" overseas repairs. The proposed amendment died in committee.[7]

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[6] Customs has long distinguished nondutiable modifications from dutiable repairs by considering the following factors: (1) whether there is a permanent incorporation into the hull or superstructure of a vessel, either in a structural sense or as demonstrated by means of attachment so as to be permanently incorporated; (2) whether in all likelihood an item under consideration would remain aboard a vessel during an extended layup; (3) whether, if not a first time installation, an item under consideration replaces a current part, fitting, or structure that is not in good working order; and (4) whether an item under consideration provides an improvement or enhancement in operation or efficiency of the vessel. See, *e.g.*, Customs Headquarters Memorandum No. 113474 from William G. Rosoff, Chief, Entry & Carrier Ruling Branch, to Chief, Liquidation Section, U.S. Customs Service (Oct. 24, 1995), *available at* http://rulings.customs.gov.

[7] This was one of a series of proposed amendments to the Customs Modernization Act of 1990. The original proposal sent by the Customs Service to the House Ways and Means Committee does not appear in the public record. The transmittal letter is cited at 136 Cong. Rec. H7211, H7214 (Exec. Comm. No. 3797) (daily ed. Sep. 5, 1990).

Background of the Case

From November 22 through December 1, 1995, the Sea-Land *PACIFIC*, a U.S.-flag cargo vessel owned by Sea-Land Service, Inc. (now known as SL Service), was dry-docked in Hong Kong to undergo mandatory Coast Guard and ABS inspections, as well as nondutiable modifications. App. 15a. It was agreed by the parties that the vessel was not in dry dock for any time longer than necessary for the inspections and modifications. *Id.* at 15a & 16a n.2. While in dry dock, the *PACIFIC* underwent dutiable repair and overhaul work costing $565,357. On the ship's re-entry, Customs assessed a 50 percent duty on the cost of that work, as required by the vessel repair statute. However, Customs also assessed duty on approximately half of the dry-docking general service expenses, based on the share of the total expenditures occupied by dutiable repair costs. App. 19a ("the dutiable and non-dutiable dry-docking expenses were apportioned by Customs according to the percentage corresponding to the value of dutiable repairs and non-dutiable expenses incurred" during the period the ship was in dry dock). Based on the ratio of total dutiable to nondutiable expenditures, $25,084 of the $49,896 in dry-docking general service expenses incurred by the *PACIFIC* was subject to the 50 percent repair duty. The duties attributable to the dry-docking expenses totaled $12,542.

SL Service timely filed an administrative protest challenging the assessment of duty on the dry-docking expenses.[8] Upon denial of its protest, SL Service paid the contested duties and filed an action in the U.S. Court of International Trade ("CIT") challenging the protest denial. The CIT held that Customs had misapplied the repair statute and entered summary judgment for SL Service. The court applied the test

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[8] The total impact on SL Service extends well beyond the duties at issue in this test case. In addition to the vessel repair duties on the *PACIFIC*, challenged duties on 14 other entries of SL Service ships await the resolution of this case.

established by the Federal Circuit in *Texaco Marine Services, Inc.* v. *United States*, 44 F.3d 1539 (Fed. Cir. 1994), which interpreted the statutory phrase "'expenses of repairs'" as covering "all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred." *Id.* at 1544. The CIT held that under *Texaco* dry-docking expenses would be dutiable only if Customs could clearly identify dry-docking expenses that were "undertaken solely for the purpose of repair." App. 18a. "Therefore, only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/or modifications are dutiable under the *Texaco* test." *Id.* at 19a-20a. The court reasoned that, because the cost of dry-docking was "an inevitable expense of a mandatory inspection," and because Customs had admitted (and the record clearly showed) that the *PACIFIC* was not dry-docked for any period in excess of the time necessary for the mandatory inspections and modifications, none of the dry-docking expenses was properly subject to the vessel repair duty. *Id.* at 19a-21a.

A divided panel of the Federal Circuit reversed. App. 1a-12a. The majority held that dry-docking expenses may be considered "expenses of repairs" under the vessel repair statute if repairs are made while the ship is in dry dock—even if, as here, the reason it was docked in a foreign port was to undergo nondutiable inspections. *Id.* at 7a. And, the majority endorsed Customs' proposed apportionment method, creating a new "dual purpose" test under which duty would be charged on a portion of dry-docking expenses corresponding to the proportion of dutiable expenses incurred while the ship was in dry dock. *Id.* at 7a-8a.[9]

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[9] For example, if a ship were in dry dock for modifications that cost $2,000, and also undertook a repair costing $8,000, 80 percent of the dry-docking costs would be subject to the vessel repair duty.

Judge Bryson dissented. He argued that "the dry-docking expenses in this case should not be dutiable because those expenses would have been incurred irrespective of whether or not dutiable repairs had been performed." App. 11a. He observed that the majority's method of parsing and apportioning dry-docking costs "finds no support in the vessel repair statute. . . . [I]n fact, the statute contains no reference to apportionment at all, which suggests that Congress did not have in mind that Customs would subdivide 'multiple cause' expenses into dutiable and nondutiable portions." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The decision below is arbitrary and threatens further to weaken the U.S.-flag merchant fleet, and therefore demands this Court's review. The Federal Circuit's new "interpretation" of the vessel repair statute not only departs from the plain language of the statute, a century of Customs practice, and common sense, but also is inconsistent with the Federal Circuit's own interpretation of the statute just a decade ago. The decision below portends considerable harm to a merchant marine that is already struggling, undercutting a long line of federal remedial legislation designed to afford U.S.-flag vessel owners relief from the duty. At the same time, the Federal Circuit's new rule does not further the purpose of the repair statute, or effect any cognizable benefit that remotely compensates for the injury to a vital national industry.

Moreover, because the Federal Circuit has exclusive appellate jurisdiction of cases involving disputes over customs duties, see 28 U.S.C. §§ 1295(a)(5), 1581(a) & (b), the issues raised by this case will not be further vetted in the lower courts. In light of the importance of the issues for the maritime industry and the nation as a whole, the Court should review the Federal Circuit's decision.

I. THE ARBITRARY DECISION OF THE FEDERAL CIRCUIT EXTENDS AND DEEPENS CONFUSION IN THE CASE LAW THAT REQUIRES THIS COURT'S RESOLUTION.

For more than a century, the vessel repair statute was understood, in keeping with its plain language, to impose a duty only on the cost of foreign repairs themselves—on "expenditures made for foreign materials or for foreign labor employed in making repairs." T.D. 39443, 43 Treas. Dec. 99, 100 (1923). Expenses incidental to repair work were not subject to duty under the statute. See, *e.g.*, *Mount Washington Tanker Co.* v. *United States*, 505 F. Supp. 209 (Ct. Int'l Trade 1980) (reversing assessment of duty on the cost of transporting workers to perform repairs), *aff'd*, 665 F.2d 340 (C.C.P.A. 1981); *International Navigation Co.* v. *United States*, 148 F. Supp. 448, 455 (Cust. Ct. 1957) (reversing assessment of duty on the cost of transporting men and materials for repair work); *American Viking Corp.* v. *United States*, 150 F. Supp. 746, 752 (Cust. Ct. 1956) (reversing assessment of duty on the cost of lighting necessary to perform repairs).

Significantly, the cost of dry-docking a ship that undergoes repairs in a foreign shipyard was held almost a century ago to be nondutiable under the vessel repair statute. *United States* v. *George Hall Coal Co.*, 134 F. 1003, 1003 (S.D.N.Y. 1905) ("the expenses of docking a vessel while undergoing repairs in a foreign port is not subject to the payment of a duty"), *aff'd*, 142 F. 1039 (2d Cir. 1906) (per curiam). In the *George Hall* decision, the Board of General Appraisers (a predecessor of the Court of International Trade) reasoned that such foreign dry-docking expenses were not dutiable because "'[t]he mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary.'" *Texaco*, 44 F.3d at 1546 (quoting the Board's ruling).

A. "Expenses of Repairs" Was Reinterpreted In *Texaco*.

In *Texaco*, the Federal Circuit expanded the reach of the repair statute by interpreting "expenses of repairs" to embrace certain expenses incidental to dutiable repairs. In that case, Customs had assessed duty on the costs of protective covering equipment in preparation for ship repairs and of cleaning up after the repairs; the ship owner objected on the ground that the taxed items were not repair expenses. 44 F.3d at 1541-42. The CIT entered summary judgment in favor of Customs, *id.* at 1542. The Federal Circuit affirmed, holding that (notwithstanding prior precedent) as a matter of plain language "expenses of repairs" should be construed "as covering all expenses . . . which, but for dutiable repair work, would not have been incurred." *Id.* at 1544. The Federal Circuit overruled the *Mount Washington*, *International Navigation*, and *American Viking* cases discussed above, see *id.* at 1546-47, but insisted that its "but for" test was consistent with the century-old *George Hall Coal* decision, which it interpreted as "stand[ing] for the proposition that expenses that would have been incurred irrespective of whether or not dutiable repairs are performed are not dutiable as an expense of repairs." *Id.* at 1546.

Under *Texaco*'s newly minted "but for" construction of the repair statute, a wide range of theretofore nondutiable expenses ancillary to repair work (such as the cleaning expenses at issue in *Texaco*) were brought within the statute's ambit. The Customs Service pointedly noted the sweeping change effected by *Texaco* in a letter ruling issued shortly after the Federal Circuit's decision:

> It is readily apparent that this case has wide-ranging ramifications with respect to Customs liquidation of vessel repair entries. For example, as you well know we currently do not consider the following foreign costs dutiable under the vessel repair statute: air, crane, drydocking charges, electricity, travel/transportation, launch

> use, lodging, security and staging. Absent these costs being incurred pursuant to [non-dutiable work], they would undoubtedly constitute [dutiable] "expenses of repairs" under the "but for" test . . . .

Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of Regulations & Rulings, to New Orleans Regional Director, Commercial Operations Division (Jan. 18, 1995), *available at* 1995 WL 64779.

B. The Federal Circuit Has Now Abandoned *Texaco*.

A decade later, in the decision below, a divided Federal Circuit abandoned the *Texaco* "but for" test as the generally applicable plain-language interpretation of the statutory phrase "expenses of repairs," and upheld for the first time the imposition (contrary to 100 years of prior Customs practice) of duties on dry-docking costs. The majority below did not expressly overrule *Texaco* or a later case applying *Texaco*, *Sea-Land Service, Inc.* v. *United States*, 239 F.3d 1366 (Fed. Cir. 2001), but held that "[t]he precedential force of *Texaco* applies only to single-purpose expenses." App. 5a. If dry-docking has "dual" purposes, by contrast, then Customs is entitled to apportion expenses between nondutiable work and dutiable repairs. *Id.*

The panel majority thus turned away from both the language of the statute (which limits the vessel repair duty to vessel repair expenses) and the "but for" gloss of *Texaco*, and created a new rule whereby undertaking repairs has a ripple effect, exposing vessel owners to potentially enormous liability for expenses that have nothing to do with repairs.[10]

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[10] The ruling affects a wide range of expenses in addition to the cost of dry-docking itself. As Customs has noted, in a rulemaking dealing with the vessel repair statute:

> Drydocking is a major, but not isolated, expense in general ship repair operations. Many other associated expenses and services are necessary adjuncts to drydocking and are logically inseparable from the

Not only did the majority's holding depart from the repair statute and from its recent *Texaco* decision (as well as decades of pre-*Texaco* administrative and judicial precedent), but it is wholly unjustifiable even on its own terms. To support its new rule, the majority pointed to exceptions to the but-for test of causation in tort law. The majority noted that in tort law cause-in-fact may be established even if the injury would have occurred because of a concurrent cause, citing the case in which two negligently caused fires together destroyed property. App. 6a-7a (citing *McClellan* v. *St. Paul, M. & M. Ry.*, 59 N.W. 978 (Minn. 1894)). As an initial matter, it is highly irregular to seek guidance from common law tort doctrine in construing a customs statute. As Judge Bryson pointed out in dissent, under the vessel repair statute, "the question is not whether and how to compensate the victim of a wrong." *Id.* at 11a. Equally fundamentally, the cited tort law doctrine does not support the result reached by the Federal Circuit. The evidence in the record does not establish that the *PACIFIC* had to be dry-docked in Hong Kong for these repairs; rather, it was undisputed that the reason the ship was dry-docked abroad was to comply with federal inspection mandates. In other words, the repairs did not "cause" the foreign dry-docking, or any part of it.

Its citation of tort law causation doctrine notwithstanding, the Federal Circuit did not simply modify the *Texaco* "but for" test and adopt a "cause-in-fact" test in determining ex-

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drydocking rule. These include such items as drydock block arrangement, sea water supply (for firefighting equipment), hose hookup and disconnection charges, fire watch services, the services of a crane for drydocking-related operations, the provision of compressed air, cleaning of the drydock following repairs, among numerous others. These necessary services are costly, are supplied at nearly each drydocking, and had until recently been considered to be classifiable as duty-free.

Foreign Repairs to American Vessels, 66 Fed. Reg. 16,392, 16,393 (Mar. 26, 2001). Now all such expenses are subject to the vessel repair duty, even if the ship was in dry dock by reason of nondutiable work.

penses of repair. Instead, the Federal Circuit adopted a very different "necessary condition" test for so-called dual-purpose expenses. Under this test, there does not have to be evidence that the need for repairs was a cause in fact of the dry-docking in a foreign port—for indeed there was no evidence that the *PACIFIC* would have dry-docked in Hong Kong to perform the repairs. The *PACIFIC* dry-docked in Hong Kong simply because that was the best available port that would enable the *PACIFIC* to meet its inspection obligations. Because the ship would already be in dry dock, petitioner arranged for certain repairs that eventually needed to be done (as well as any new repairs that might be discovered while the ship was docked); such repairs had no causal relationship to the Hong Kong dry-docking. Petitioner thus would have prevailed below under a cause-in-fact test (as well as under the *Texaco* but-for test). Instead of looking to whether the need for repairs was an actual cause in fact of the foreign dry-docking, the majority below looked instead to the nature of the repairs, and whether as a general matter they could have been performed without dry-docking *at some point*. The Federal Circuit thus in effect held that dry-docking expenses are dutiable if dry-docking is a necessary condition for implementing the repairs: *i.e.*, in the Federal Circuit's words, if dry-docking was "required by dutiable repairs." App. 7a.

C. The Federal Circuit's Ruling Is Arbitrary.

The Federal Circuit's construction of the vessel repair statute is arbitrary in five separate respects. First, it is arbitrary as a matter of statutory construction. The general rule is that customs statutes are interpreted according to the ordinary sense of the language used by Congress, see *Texaco*, 44 F.3d at 1543, with courts entitled to give appropriate weight in resolving ambiguity to the persuasive interpretations of the Customs Service under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). See *United States* v. *Mead Corp.*, 533 U.S. 218, 234-35 (2001). In *Texaco*, as noted above, the Federal Circuit rejected the longstanding agency and judicial construction of

the statute limiting duties to the actual expenses of repairs, ruling as a matter of putative plain language that the term "expenses of repairs" broadly covered other kinds of expenses that would not have been incurred but for the repair (regardless of whether they were required by that repair). 44 F.3d at 1546. But now that putative plain meaning does not hold if dry-docking serves so called "dual purposes" of inspection and repair. In the latter circumstance, the simple term "expenses of repairs" has the opposite meaning: dual-purpose expenses like dry-docking are dutiable if they are required to perform the repair (regardless of whether they would have been incurred but for the repair). App. 7a. Neither part of this contradictory, hybrid test has anything to do with the plain meaning of the simple term "expenses of repairs" in the statute. The statute contemplates that an expense either is or is not a dutiable expense of repair. Congress did not create such a hybrid expense, as the Federal Circuit has done.

Second, the Federal Circuit's new test is arbitrary as a matter of administrative law. In *Sea-Land*, the Federal Circuit confirmed that its *Texaco* but-for test was a judicial construction of the statute's plain meaning from which the Customs Service was not free to depart. See *Sea-Land*, 239 F.3d at 1372-73. Perhaps (if this case had gone *en banc*) the Federal Circuit could have decided to overrule *Texaco* and *Sea-Land* and adopt a new, generally applicable interpretation of the statutory term "expenses of repairs," relying on the positions espoused by Customs to the extent of their persuasiveness as to statutory meaning. *Mead*, 533 U.S. at 234. Instead, the majority left *Texaco* and *Sea Land* intact as precedent, App. 5a, with the perverse result that the single term "expenses of repairs" has a plain meaning from which Customs cannot depart in some circumstances, and a different and mutually exclusive meaning in other circumstances whereby Customs's newfangled apportionment test is upheld simply because it is (in the panel majority's view) "rational." *Id.* at 7a.

Third, not only did the majority below give the vessel repair statute a new and unreasonable interpretation, but also it rubber-stamped the Customs Service's capricious apportionment methodology that, as Judge Bryson pointed out, "finds no support in the vessel repair statute." App. 12a (Bryson, J., dissenting).

> The government's method requires Customs to apportion the costs in question between dutiable costs of repair and other, nondutiable costs. The statute, however, offers no guidance as to how such an apportionment should be conducted; in fact, the statute contains no reference to apportionment at all, which suggests that Congress did not have in mind that Customs would subdivide "multiple causes" into dutiable and nondutiable repairs.

Id. The majority's claim that it accepted Customs's apportionment test out of deference to "Customs' long-standing practice," *Id.* at 8a, is disingenuous. The majority relied on three letter rulings where Customs apportioned for one special and minor kind of expense (the cost of obtaining a gas free certificate). See *id.* For every other kind of ancillary expense (including dry-docking), the longstanding practice of Customs was not to apportion, but simply to treat those nonrepair expenses as nondutiable. If the majority had given longstanding administrative practice its due (or abided by its own interpretation in *Texaco*), it would not have embraced the Customs Service's contrived apportionment method.

Fourth, the Federal Circuit arbitrarily blessed an apportionment method that is antithetical to its own construction of the statute. If indeed the majority's construction of the statute were correct, the logical basis for apportionment should only be those repairs that require dry-docking, see App. 7a. Instead, the Customs Service apportions on the basis of *total* repair expenses. The numerator in the dutiable/nondutiable ratio is not repairs requiring dry-docking, but simply "dutiable repairs," undifferentiated. *Id.* at 2a; accord Customs

Headquarters Memorandum No. 115194 from Larry L. Burton, Chief, Entry Procedures & Carriers Branch, to Chief, Residual Liquidation & Protest Branch, U.S. Customs Service (Dec. 19, 2000), *available at* http://rulings.customs.gov. Thus, if a ship while in dry dock had inspection and modification costs of $5,000, repairs of $5,000 that required dry-docking, and repairs of $40,000 that did not require dry-docking, then 90% of the dry docking expenses would be dutiable even though only 10% of the inspection, modification, and repair expenses would fall within the Federal Circuit's "required by dutiable repairs" standard. The majority's approach defies common sense and does violence to both the text and the policy of the statute.[11]

Finally, the Federal Circuit's new method yields the incongruous result that actual repair expenses become in many cases a small part of the base on which "repair" duties are assessed. By way of illustration, take two ships, each dry-docked at a cost of $60,000. Each ship while in dry dock undergoes ABS inspections costing $10,000 and dutiable repairs costing $50,000 (the repairs do not require dry-docking for any period exceeding that necessary for the mandatory inspections). Ship 1 undergoes no modifications, but Ship 2 spends $1 million on nondutiable modifications. On re-entry to the U.S., Ship 1 will be assessed a 50% duty on $50,000 in dry-docking expenses (because dutiable repairs accounted for 5/6 of total expenditures while in dry dock); Ship 2 will be assessed a 50% duty on approximately $2,500 in dry-docking expenses (because dutiable repairs accounted for just under five percent of its expenditures).

This wide disparity cannot be justified on any reasonable reading of the repair statute, because the disparity derives principally from the happenstance of greater or lesser expen-

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[11] There is evidence in the record that not all the Hong Kong repairs required dry-docking. *See* J.A. 838, *SL Serv.* v. *United States*, 357 F.3d 1358 (Fed. Cir. filed July 21, 2003).

ditures that are *not* independently subject to duty under the statute. In the hypothetical above, Ship 1 pays $50,000 in total duties (on the repair and the allocable dry-docking expenses); Ship 2 pays $21,250. Thus, Ship 1 pays almost $30,000 more in duties, even though the two ships spent the same amounts for dry-docking and repairs. And, considering that dry-docking expenses often occupy a large share of the costs incurred by a vessel in dry dock, the disparity hits hard at the bottom line. Nor would the duty assessed on Ship 1 in this hypothetical further the statute's purpose, which is to capture a share of the cost of ship repair. It is one thing to tax, say, the cost of cleaning up after repairs; it is quite another to assess a duty of $50,000 on a $50,000 repair. That is not extrapolation. It is the creation of a new and substantial liability, unrelated to the 50% duty assessed by statute.

Such a radical recasting of the vessel repair statute should be a matter for Congress, not for the Customs Service or a badly divided appeals court panel. It is especially unwarranted when the Customs Service recently failed to interest Congress in an amendment to the repair statute that would have made dry-docking and other expenses "associated" with repairs dutiable. *Supra* at 9. After that proposed amendment failed, Customs undertook unilaterally to redefine the statute. The Federal Circuit should not have allowed that, and this Court should not permit the redefinition to stand.

Moreover, by imposing significant new operating costs on U.S.-flag vessel owners, Customs and the Federal Circuit not only transgress their institutional bounds, but also they directly undermine federal policy. As discussed *supra* at 5, Congress over the past few decades has responded to the flagging state of the merchant marine with legislation designed to make the industry more competitive. Against this backdrop, it is exceedingly unlikely that Congress would sanction a major expansion of the vessel repair duty when the commercial shipping industry is struggling merely to survive. In fact, the nearest analogue is exactly to the contrary: in

1943, with the maritime fleet depleted by wartime losses (and domestic shipyards operating at capacity), Congress *suspended* the repair duty until the industry was back on its feet. See Act of Dec. 17, 1943, ch. 345, 57 Stat. 601.

II. THE FEDERAL CIRCUIT'S RULING INFLICTS SUBSTANTIAL HARM ON THE U.S. MERCHANT FLEET WITH NO COUNTERVAILING BENEFIT.

If allowed to stand unreviewed, the decision below will have serious adverse effects on the U.S.-flag fleet. Dry-docking is a routine part of doing business for commercial vessel owners; indeed, as in this case, periodic dry-docking is *required* by the Coast Guard rules governing U.S.-flag vessels. And it is very expensive—shipyard dry-docking and overhaul constitute one of the biggest items in a cargo vessel's operating budget (after fuel, labor, and onboard maintenance and repairs). Since a merchant ship has repairs done virtually every time it is in dry dock, the duty assessment rule announced by the Federal Circuit in this case ensures that the previously (and historically) limited vessel repair duty will now capture a significant portion of the operating expenses of U.S.-flag vessels.[12]

Moreover, set against these substantial harms is no identifiable benefit, apart from an uptick in federal revenue (a pyrrhic victory for the public fisc if the industry continues to decline). The new rule does not further the purpose of the vessel repair statute, which is "to encourage U.S. shipowners to

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[12] Even if a ship owner, to limit its exposure to vessel repair duties, refrained from having an expensive dutiable repair performed while the ship was in dry dock in a foreign port, the owner would then have to dock the ship again in the U.S. (for any repair requiring dry-docking). That is, a vessel owner in this circumstance is given the Hobson's choice between, on the one hand, incurring substantial duties on foreign dry-docking and, on the other, paying twice for dry-docking and taking the ship out of commission for additional days or weeks—this on top of the declining capacity of domestic shipyards and the often vastly higher costs of having the work done in the United States.

employ U.S. labor whenever possible." *Mount Washington Tanker Co.* v. *United States*, 665 F.2d 340, 344 (C.C.P.A. 1981). As noted above, American shipyards are often unavailable to repair private cargo vessels (indicating that the domestic yards are hardly starving for business). In almost all cases, therefore, U.S.-flag vessel owners engaged in overseas trade will have no realistic choice but to absorb the additional duties, and thus become less competitive—or get out of the business altogether.

In sum, the decision below has no warrant in the statute or historical practice. Without any substantive change in the vessel repair statute, the Federal Circuit has approved the assessment of repair duties on dry-docking expenses that for a century had not been dutiable and would not be dutiable under the Federal Circuit's prior "but-for" construction of the statute. The test created by the Federal Circuit is arbitrary in application, creates confusion in administration, and promises further to weaken an industry with deep strategic importance to our nation. For these reasons the holding of the divided panel warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 03-1174

SL SERVICE, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

Feb. 4, 2004

Before MAYER, *Chief Judge*, BRYSON and LINN, *Circuit Judges*.

MAYER, *Chief Judge*.

The United States Customs Service ("Customs") appeals the judgment of the Court of International Trade granting summary judgment in favor of SL Service, Inc. ("SL Service").[1] *SL Serv., Inc. v. United States*, 244 F.Supp.2d 1359 (Ct. Int'l Trade 2002). Because the Court of International Trade erroneously applied *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994) ("*Texaco*"), we reverse.

Background

Between November 22 and December 1, 1995, the Sea-Land Pacific, a ship owned by SL Service, was dry-docked at

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[1] On November 9, 1999, the Court of International Trade designated this case a test case. *SL Serv.*, 244 F.Supp.2d at 1360.

the Hongkong United Dockyards for the purpose of obtaining American Bureau of Shipping and United States Coast Guard required inspections and modifications, which are non-dutiable, in addition to dutiable repairs. Upon returning to the United States, Customs assessed a duty pursuant to 19 U.S.C. § 1466(a), which states that "[t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States . . . shall . . . be liable to entry and the payment of an ad valorem duty . . . on the cost thereof in such foreign country." (emphasis added).

As part of this assessment, Customs determined that the cost of dry-docking should be considered an "expense of repair" because it was necessitated by the dutiable repairs as well as the non-dutiable inspections and modifications. Customs did not, however, impose the 50% *ad valorem* duty on the full cost of dry-docking. Instead, it determined that only that portion of the cost of dry-docking attributable to the dutiable repairs should be used to calculate the duty. This amount was determined by dividing the cost of dutiable repairs by the sum of the cost of dutiable and non-dutiable work. The cost of dry-docking was then multiplied by this fraction, resulting in an estimation of the cost of dry-docking due to the dutiable repairs. The 50% *ad valorem* duty was applied to this amount.

After having timely protested the liquidation to Customs, SL Service brought this challenge in the Court of International Trade claiming that the duty imposed on dry-docking violated the "but for" test prescribed by *Texaco* and that the apportionment technique was contrary to section 1466(a). In addition, SL Service argued that Customs violated 19 U.S.C. § 1625(c) by failing to provide notice and receive comment about the use of apportionment. Having stipulated that

the Sea-Land Pacific was dry-docked for no longer than necessary to complete the non-dutiable inspections and modifications, both parties moved for summary judgment.

The Court of International Trade granted summary judgment in favor of SL Service. It found that *Texaco* delineated two categories of expenses for the purpose of 19 U.S.C. § 1466(a). The first category, considered "expenses of repairs" and therefore dutiable, would not be incurred "but for" the undertaking of dutiable repairs. The second category, non-dutiable expenses, referred to those expenses incurred for the purpose of obtaining only non-dutiable inspections and modifications as well as those required by both dutiable and non-dutiable work ("dual-purpose expenses"). Based on this reading of *Texaco*, the court determined that the duty was arbitrary, capricious and in violation of the law because the dry-docking of the Sea-Land Pacific was necessitated by both non-dutiable and dutiable work. As such, it was a dual-purpose expense not subject to section 1466(a).

On appeal, Customs contends that the Court of International Trade's interpretation of *Texaco* is too narrow and in contravention of the language and purpose of 19 U.S.C. § 1466(a). Customs claims that the holding in *Texaco* applies only to expenses incurred as the result of either non-dutiable or dutiable work ("single-purpose expenses"), but not to dual-purpose expenses. Further, it argues that section 1466(a), a statute enacted to protect the domestic shipbuilding and repair industry, should not be interpreted in a manner that would allow artful ship-owners to avoid virtually all duties on expenses of foreign repairs.

Discussion

This case raises two questions: (1) whether dry-docking that is required by both dutiable and non-dutiable work is an "expense of repair"; and (2) whether Customs' use of

apportionment is permissible. With respect to both, we answer in the affirmative.

We review a grant of summary judgment by the Court of International Trade *de novo*. *New Zealand Lamb Co., Inc. v. United States*, 149 F.3d 1366, 1367 (Fed.Cir.1998). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ct. Int'l Trade R. 56(c); Fed.R.Civ.P. 56(c).

1. The crux of the error below was the court's misinterpretation and resulting misapplication of *Texaco*, in which we were asked to decide whether "cleaning performed subsequent to dutiable repairs . . . [and] . . . work associated with protective coverings used during dutiable repairs" were "expenses of repairs" and, therefore, dutiable. 44 F.3d at 1541. We determined that the expenses at issue were dutiable because they would not have been incurred "but for" dutiable repairs. *Id.* at 1544. In so holding, we announced the following test: "expenses of repairs" covers all expenses "which, but for dutiable repair work, would not have been incurred." *Id.*

The most obvious difference between the facts here and those in *Texaco* is that *Texaco* dealt with single-purpose expenses while the dry-docking of the Sea-Land Pacific was a dual-purpose expense. As such, the "but for" test, which was formulated for classification of single-purpose expenses, is inapplicable. SL Service counters that *Texaco* did, in fact, "consider" dual-purpose expenses. It relies on a footnote in *Texaco*, which states

> Although it appears that some cleaning of the cargo tanks to prepare them to carry cargo would have been necessary even if the repairs had not been made, it also is true that all the debris mentioned in the invoice was created by the repairs. In this regard, the invoice does

> not indicate that the cleaning included the cleaning of the remains of previous cargo. In any event, Texaco has made no effort to separate from the total G-2(g) expenses amounts that would have been incurred to clean the cargo tanks as a normal maintenance service had the G-2 repairs not been made.

44 F.3d at 1548 n. 9. SL Service extrapolates from this that we specifically considered dual-purpose expenses because we noted that the petitioner in *Texaco* could have differentiated the expenses at issue but chose not to. Our observation, however, did nothing to change the nature of expenses at issue, all four of which were single-purpose expenses. *Id.* at 1541-42. It is irrelevant to our determination of the dutiability of dual-purpose expenses that Texaco could have argued that the cleaning expenses were necessitated by both dutiable and non-dutiable work. The precedential force of *Texaco* applies only to single-purpose expenses. This is equally true with respect to *Sea-Land Service, Inc. v. United States*, 239 F.3d 1366 (Fed.Cir.2001), because it addressed the same type of expenses considered by *Texaco*.

SL Service also submits that the discussion in *Texaco* of *United States v. Geo Hall Coal*, 142 F. 1039 (2d Cir.1906), establishes that the "but for" test applies to dual-purpose expenses. 44 F.3d at 1545-46. According to SL Service, the section referring to *Geo Hall Coal* held that dry-docking was not a dutiable expense when it is required by non-dutiable inspections and modifications. This contention, however, is not supported by either case.

First, there is no evidence that the dutiable repairs in *Geo Hall Coal* required dry-docking. The only information available to us now, or in *Texaco*, was contained in an unpublished opinion of the Department of Treasury Board of General Appraisers, which did not specify the type of dutiable repairs performed or whether they necessitated dry-docking. The decision stated only that dry-docking is not *always* an

expense of repairs because dutiable repairs are made. For instance, dry-docking may be required by the inspections and modifications, but not by the dutiable repairs. Therefore, it is just as likely that the outcome in *Geo Hall Coal* is consistent with our holding here. Second, *Geo Hall Coal* addressed a jurisdictional question only. 134 F. 1003 (S.D.N.Y.1905), *aff'd*, 142 F. 1039 (2d Cir.1906). There were no findings with respect to the dutiability of dry-docking. Finally, the discussion in *Texaco* is consistent with the fact that the dutiable repairs in *Geo Hall Coal* did not require dry-docking. 44 F.3d at 1545-46. According to *Texaco*, "the board held that the dry-docking expense was not subject to the vessel repair duty because the board found that the expense would have been incurred irrespective of whether or not dutiable repairs were performed." *Id.* at 1546. This does not imply, as SL Service contends, that dry-docking is never dutiable when required by non-dutiable inspections and modifications. It merely reiterates that the dry-docking in *Geo Hall Coal* was required by the inspections and modifications and would have been needed whether or not the dutiable repairs, which did not necessarily require dry-docking, were performed.

The well-developed history of the "but for" test instructs that special treatment is required when concurrent and independently sufficient acts combine to cause harm. *See* W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 41, at 266 (5th Ed.1984). In one such scenario, two negligently caused fires merged and destroyed a plaintiff's property. *See McClellan v. St. Paul, M & M R. Co.*, 58 Minn. 104, 59 N.W. 978 (1894); Dan B. Dobbs, The Law of Torts § 171, at 414 (2000). "[A] literal and simple version of the but-for test holds that neither defendant's act is a cause of the harm." Dobbs § 171, at 414. Such a result, however, has been universally condemned as "violating both an intuitive sense of causation and good legal policy." *Id.* § 171, at 415; *see also* Restatement (Third) of Torts: Liability for Physical Harm § 27 (Tentative Draft No. 2) ("[C]ourts have long

imposed liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing causal set had not been operating.").

The non-dutiable inspections and modifications and the dutiable repairs are analogous. In the same sense that each fire was responsible for the damage, the dry-docking was equally *caused* by both the non-dutiable and dutiable work. And just as the tortfeasor in concurrent causation cases is held responsible for the harm he causes, it is rational to consider the dry-docking an "expense of repairs."

Texaco did not hold that dry-docking is always non-dutiable when required by inspections and modifications. In fact, there is no basis upon which to contend that it even considered dual-purpose expenses. Dry-docking that is required by dutiable repairs is, therefore, rightly considered an "expense of repairs" and is subject to 19 U.S.C. § 1466(a).

2. SL Service next argues that Customs' method of apportionment is contrary to 19 U.S.C. § 1466(a). According to SL Services' line of reasoning, apportionment is illegal because the imposition of a duty on dry-docking violates the "but for" test. This argument, of course, simply relies on its primary contention that dual-purpose dry-docking is not dutiable. However, apportionment is consistent with section 1466(a) and the "but for" test. In the context of dual-purpose expenses, it is rational to impose the duty on only that portion of the expense that is fairly attributable to the dutiable repairs. Indeed, to impose the 50% *ad valorem* duty on the entire cost of dry-docking in this case would exceed the mandate of the statute. The logical appeal of apportionment has been recognized in other areas of the law. In tort law, "apportionment may be made on the ground that one defendant caused a particular loss or an identifiable share of the loss and should be liable for no more." Dobbs § 170, at 413.

In addition, apportionment has been used by Customs for some time and is, therefore, entitled to deference. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978); *see also Brown v. Gardner*, 513 U.S. 115, 122, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *Toyota Motor Sales, U.S.A., Inc. v. United States*, 585 F.Supp. 649, 7 C.I.T. 178, 192 (1984), *aff'd*, 753 F.2d 1061 (Fed.Cir.1985) ("In interpreting a statute a long-standing administrative practice is entitled to deference by the courts, even where, as here, judicial review is *de novo*."). As evidence of its practice, Customs provided three letters documenting the use of apportionment in the liquidation of vessel repair entries. In all three letters the cost of obtaining a gas free certificate was apportioned between the dutiable repairs and non-dutiable work. Customs explained in the letter dated March 31, 1993:

> The costs associated with obtaining a Gas Free Certificate constitute ordinary and necessary expenses incident to repair operations and are thus dutiable. In liquidating these charges, such charges are to be apportioned between the costs which are to be remitted and those for which relief is not warranted, and duty assessed on that portion of the charges applicable to items which are not being remitted. In the present case, as the certificates related to inspections, they should be prorated accordingly.

Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense.

Finally, SL Service contends that Customs' use of apportionment had the effect of modifying either prior rulings or "the treatment previously accorded . . . to substantially identical transactions," and, therefore, triggered 19 U.S.C. § 1625(c). As evidenced by the "Customs Information Exchange" letters, however, Customs has used apportionment in

the context of section 1466(a) for more than 40 years. Because apportionment is an established agency practice, its use does not constitute the revocation or modification of a previous ruling or treatment, and therefore section 1625(c) is inapplicable.

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

REVERSED.

BRYSON, *Circuit Judge*, dissenting.

I respectfully dissent.

The vessel repair statute, 19 U.S.C. § 1466(a), imposes a duty on the "expenses of [ship] repairs made in a foreign country." In *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994), this court held that in determining whether a particular expense is a dutiable expense of repair, a "but for" test should be used. The court thus interpreted "expenses of repair" as covering "all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." 44 F.3d at 1544. Application of the "but for" test would render the dry-docking expenses at issue in this case non-dutiable, because the dry-docking was done for inspection and maintenance purposes as well as for repairs, and thus the expenses would have been incurred even without the occurrence of the dutiable repair work.

The court today holds that the expenses are dutiable by accepting the government's invitation to depart from the "but for" test of *Texaco* with respect to expenses that are attributable to two or more causes. In that setting, the court holds, the dutiable share of the expenses should be determined by apportionment between the dutiable repairs and the other cause or causes of the expenditure. I disagree with the court's adoption of this "multiple causes" gloss on *Texaco*. Instead, I would apply the "but for" test of *Texaco* in this context and, based on that test, I would uphold the decision of the Court of International Trade that the expenses at issue in this case are not dutiable.

As I read the decision in *Texaco*, the court anticipated cases of this sort. Particularly enlightening is the *Texaco* court's treatment of the earlier decision in the *Geo Hall Coal*

case to which the majority alludes. *Geo Hall Coal* involved dry-docking expenses that were incurred for the purpose of determining whether repairs were necessary. The dry-docking expenses in that case were held not to be dutiable. While the majority is correct that the cryptic statement of the facts by the Board of General Appraisers in the *Geo Hall Coal* case does not state that the dry-docking was necessary to perform the repairs at issue in that case, the *Texaco* court treated the dry-docking expenses as if they were necessary for the repairs. *See* 44 F.3d at 1546, quoting *Int'l Navigation Co. v. United States*, 38 Cust. Ct. 5, 148 F.Supp. 448 (Cust.Ct.1957). Based on that premise, the *Texaco* court concluded that the dry-docking expenses in that case nonetheless were not dutiable because they "would have been incurred irrespective of whether or not dutiable repairs were performed." 44 F.3d at 1547. As applied to this case, that principle means that the dry-docking expenses in this case should not be dutiable because those expenses would have been incurred irrespective of whether or not dutiable repairs had been performed.

In departing from the *Texaco* "but for" test, the court today looks to tort law principles of causation as applied to multiple tortfeasors. In that setting, the law generally holds each tortfeasor liable for the victim's injury if that tortfeasor's conduct was sufficient to cause the injury even if, because of the conduct of the others, the victim would have suffered the same injury absent each particular tortfeasor's conduct. For such cases, it makes good sense to depart from the "but for" test, because the consequences of adhering to the test would be that all of the multiple culpable actors would escape liability and the one innocent party—the victim—would be forced to bear the burden of the injury. In the context of the vessel repair statute, however, the question is not whether and how to compensate the victim of a wrong. Congress has determined that a duty of 50 percent on foreign repairs is the appropriate amount to protect the American

shipbuilding industry from foreign competition; the question before us is simply whether, in determining how to calculate that 50 percent duty, a particular expense should be attributed to the cost of repairs. And the answer to that question is best given by the formula set forth in *Texaco:* that the expense is not an expense of repair if it "would have been incurred irrespective of whether or not dutiable repairs were performed." 44 F.3d at 1546.

Quite apart from the teachings of the *Texaco* case, the government's proposed method of determining causation in a multiple cause setting finds no support in the vessel repair statute. The government's method requires Customs to apportion the costs in question between dutiable costs of repair and other, nondutiable costs. The statute, however, offers no guidance as to how such an apportionment should be conducted; in fact, the statute contains no reference to apportionment at all, which suggests that Congress did not have in mind that Customs would subdivide "multiple cause" expenses into dutiable and nondutiable portions.

Based on the language of the statute, as construed by this court in *Texaco*, I believe that the Court of International Trade applied the proper test for determining causation in the setting presented by this case, and I would therefore affirm the judgment of the trial court.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

SLIP OP. 02-121
Court No. 99-03-00151

SL SERVICE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Oct. 15, 2002

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Senior Judge.*

Plaintiff, SL Service, Inc. ("SL Service"), moves for summary judgment pursuant to USCIT R. 56 alleging that the undisputed material facts in this case show that, as a matter of law, the United States Customs Service ("Customs") misapplied the vessel repair statute, 19 U.S.C. § 1466 (1994), as interpreted in *American Ship Management, LLC v. United States*, 25 CIT —, 162 F.Supp.2d 671 (2001), and *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994), by assessing vessel repair duties on SL Service's dry-docking expenses on a pro-rata basis during a period of mandatory inspections by the American Bureau of Shipping ("ABS") and the United States Coast Guard ("USCG"). Customs contends that it acted legally by apportioning the dry-docking expenses on a pro-rata basis in a fashion mimicking the methodology used by Customs for

apportionment of expenses between dutiable and non-dutiable work. Since no genuine issue as to any material fact remains, and for the reasons stated below, SL Service's motion for summary judgment is granted.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

DISCUSSION

I. Background

On November 9, 1999, this Court granted an Order designating Consolidated Court Number 99-03-00151 a test case. Originally, this case included SL Service, Inc. and a second plaintiff, namely American Ship Management ("ASM"). ASM and SL Service filed a joint motion for summary judgment before this Court on November 9, 2000, and Customs filed a cross-motion for summary judgment on March 2, 2001. In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, this Court denied both motions and ordered that the parties proceed with the litigation on the merits.

By Order of Partial Dismissal dated February 28, 2002, ASM was dismissed, with prejudice, as a party in this pending action. SL Service proceeded with court ordered discovery and provided Customs with: (a) Sea-Land Pacific Drydock Report NOV/DEC 1995—HUD—HKG ("Dry-Docking Report"); (b) Sea-Land Pacific Planning Schedule; (c) Spreadsheet prepared by Joseph Breglia; and (d) Declaration of Joseph Breglia. *See* Pl. SL Service Inc.'s Mem. Supp. Mot. Summ. J. at 2-3 ("Pl.'s Mem."); *see also* Pl.'s Mem. at Exs. A-D.

II. Undisputed Facts

This case concerns dry-docking duties imposed by Customs on the vessel Sea-Land Pacific owned by SL Service.[1] *See American Ship Management*, 25 CIT —, 162 F.Supp.2d 671. The Sea-Land Pacific was dry-docked at the Hongkong United Dockyards Ltd. from November 22, 1995, through December 1, 1995, in order to comply with mandatory USCG and ABS regulations requiring certain inspections and modifications. During the dry-docking, the Sea-Land Pacific underwent non-dutiable modifications as well as dutiable repairs. The Sea-Land Pacific was not dry-docked for a period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671.

III. Contentions of the Parties

SL Service asserts that the Dry-Docking Report and additional exhibits provided to Customs adequately show that "non-dutiable mandatory inspections and modifications occurred . . . from November 22, 1995 through December 1, 1995, and that no dry-docking occurred beyond the period [necessary for] non-dutiable mandatory inspections and/or modifications [to take place]." Pl.'s Mem. at 3; *see also* Pl.'s Statement of Material Facts Not in Issue at 2-3. SL Service contends that such documents support the argument that under the test established by *Texaco*, 44 F.3d 1539, and articulated in *American Ship Management*, 25 CIT —, 162

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[1] Plaintiff properly filed a Motion to Amend Summons, changing plaintiff's name from Sea-Land Service, Inc. to SL Service, Inc., on July 27, 2000. This Court granted SL Service's motion on August 29, 2000, and considers Customs' naming of plaintiff as Sea-Land Service, Inc., instead of SL Service, Inc. in this summary judgment proceeding, a mere oversight.

F.Supp.2d 671, none of the maintenance expenses of dry-docking the Sea-Land Pacific are dutiable and, therefore, summary judgment is appropriate. *See* Pl.'s Mem. at 4-7.

Customs continues to maintain that "the original methodology used by Customs in this action to apportion the dry-docking costs was reasonable, proper, and in accordance with law." Def.'s Mem. Resp. Pl.'s Mot. Summ. J. at 3. Customs, however, admits "that the Sea-Land Pacific was not dry-docked for any period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management* [, and that] . . . none of the maintenance expenses of dry-docking are dutiable in this action." *Id.* at 3-4. Customs further contends that the discovery produced by SL Service "would not be generally sufficient to satisfy a plaintiff's burden as set forth in *American Ship Management*. . . ."[2] *Id.* at 3 n. 4.

IV. Analysis

A. *American Ship Management's* Application of *Texaco*

1. Statutory Background and the *Texaco* Test

Section 1466(a) of United States Code, Title 19, provides that

> [t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States . . . shall . . . be liable to entry and the payment of

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[2] The Court is not amused by this argument, and finds that the evidence produced by SL Service, in addition to the statements provided by Customs in Defendant's Response to Plaintiff's Statement of Material Facts, clearly show that the Sea-Land Pacific was only dry-docked for the length of time necessary to perform non-dutiable mandatory inspections and/or modifications.

> an ad valorem duty . . . on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (emphasis added).

The case at bar involves the interpretation of the term "expenses of repairs" used in 19 U.S.C. § 1466(a). Prior to the Federal Circuit decision in *Texaco*, 44 F.3d 1539, Customs used a restrictive interpretation of the term. For example, Customs did not treat the dry-docking as an "expense of repairs" making dry-docking expenses non-dutiable. *See Texaco*, 44 F.3d 1539. Customs' pre-Texaco treatment was based upon the premise that dry-docking expenses were not "part of" and/or "directly involved" in a dutiable repair. *See id.*

The court in *Texaco* examined the statutory language, determined the language to be clear and unambiguous, and concluded that it is proper to

> interpret [the term] "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, [the term] "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work. [In sum,] the "but for" interpretation accords with what is commonly understood to be an expense of a repair.

Texaco, 44 F.3d at 1544 (citations omitted).

> The court in *Texaco* also specified that [t]he mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary. The examination might show the hull to be in perfect condition, requiring no attention of any kind.

Id. at 1546 (citing *United States v. Geo Hall Coal Co.*, 142 F. 1039 (2d Cir.1906)).

In *American Ship Management*, 25 CIT at —, 162 F.Supp.2d at 674, this Court observed that Customs started assessing duty on the dry-docking expenses which would not have been incurred "but for" dutiable repairs even if the expenses were not "part of" and/or "directly involved" in the repair itself, in light of the *Texaco* decision.

2. Apportionment Under the *Texaco* Test

In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the plaintiff, SL Service, argued that any imposition of duties on dry-docking expenses on a pro-rata basis is per se illegal under the *Texaco* test. SL Service further pointed out that "the Federal Circuit has specifically ruled" that "mixed purpose dry-docking . . . do[es] not qualify as expenses of repairs." *American Ship Management*, 25 CIT at —, 162 F.Supp.2d at 674 (internal quotations and citation omitted). While the Court agreed with the plaintiff's reading of *Texaco* with regard to "mixed purpose" dry-docking expenses in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the Court disagreed with the plaintiff's unreasonable expansion of the *Texaco* holding.

In essence, the court in *Texaco* delineated two categories of expenses under 19 U.S.C. § 1466(a), specifically: (1) dutiable expenses that would not be undertaken "but for" the need to repair; and (2) non-dutiable expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose" related to a dutiable repair as well as to a non-dutiable activity, e.g., an inspection or modification. The *Texaco* classification, however, does not make an apportionment of dry-docking expenses per se illegal if there is a clear identification of the dutiable dry-docking expenses undertaken solely for the purpose of repair and the non-dutiable dry-docking expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose." *See generally*, *Texaco*, 44 F.3d 1539. Therefore, the Court held that Customs correctly concluded that it could apportion dry-

docking expenses under the mandate of 19 U.S.C. § 1466(a), as clarified by *Texaco*, 44 F.3d 1539.

3. Pro-Rata Apportionment Used by Customs

In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the dutiable and non-dutiable dry-docking expenses were apportioned by Customs according to the percentage corresponding to the value of dutiable repairs and non-dutiable expenses incurred by each vessel. While the general concept of apportionment of dry-docking expenses does not contradict the holding of *Texaco*, 44 F.3d 1539, the particular apportionment used by Customs was arbitrary, capricious and in violation of the classification designated by *Texaco*, 44 F.3d 1539.

Dry-docking expenses include, among other things, maintenance expenses and the cost of tugs to put the vessel into and out of dry dock.[3] *See, e.g., Dahlia Maritime Co. v. M/S Nordic Challenger*, 1993 WL 268413 (E.D.La.1993). Consequently, the cost of tugs is an inevitable expense of a mandatory inspection and, thus, is non-dutiable. *See Texaco*, 44 F.3d 1539. Similarly, all maintenance charges (along with all other charges related to the maintenance)[4] associated with the dry-docking during the period of mandatory inspection and/or modifications are non-dutiable expenses under the test posed by *Texaco* notwithstanding whether or not the vessel undergoes any repair during this period. *See id.* Therefore, only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory

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[3] The latter usually comprises the main expense of the dry-docking process.

[4] The term "maintenance" in the context of dry-docking usually associates with utilities and analogous services. The related charges could include, for example, the procedures and tools necessary to bring and keep the vessel in a stable position.

inspection and/or modifications are dutiable under the *Texaco* test. *See id.*

While, under an unlikely scenario, such calculation may create a result accidently corresponding to that reached by Customs in the given case, this possibility is irrelevant to the validity of Customs' method of calculation because the method violates, as a matter of law, the test offered by *Texaco*, 44 F.3d 1539. Accordingly, this Court, in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, ordered Customs to obtain from SL Service the information necessary to make a calculation supported by logic rather than random guessing.[5]

B. Determination at Bar

"On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F.Supp. 1048, 1050 (1988) (citation omitted). In this case, the parties now stipulate to the central fact at issue, namely, that the Sea-Land Pacific was not dry-docked for a period of time longer than

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[5] In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, Customs asserts that SL Service failed to satisfy the plaintiff's "burden" because, according to Customs, there was no pertinent information in the plaintiff's original brief. This Court presumed that Customs was referring to the term "burden of production." The term "burden of production" defines the burden on one party to introduce sufficient evidence to avoid judgment against that party as a matter of law. Specifically, the plaintiff shall go forward with the evidence on the issue, thus, shifting the burden to the defendant to produce evidence showing otherwise. *See, e.g., Environmental Defense Fund, Inc. v. EPA*, 179 U.S.App. D.C. 43, 548 F.2d 998, 1013 (D.C.Cir.1976) (noting that the burden of production does not necessarily lay with the same party carrying the burden of persuasion). In the case at bar, SL Service and Customs now stipulate that the vessel, Sea-Land Pacific, was not dry-docked for a period longer than that necessary to perform the mandatory inspections and/or modifications required by the USCG and ABS.

that necessary to perform the mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671. In accordance with the holding in *American Ship Management*, this Court finds that SL Service met its "burden of production," and therefore SL Service's motion for summary judgment is granted.

V. CONCLUSION

For the foregoing reasons, the Court grants SL Service's motion for summary judgment. Judgment will be entered accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed April 12, 2004]

03-1174

SL SERVICE, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate for the court will issue on April 19, 2004.

FOR THE COURT,

/s/ Jan Horbaly [amt]
JAN HORBALY
Clerk

Dated: April 12, 2004

cc: Barbara S. Williams
Evelyn Suarez
Lauren R. Howard

SL SERVICE V US, 03-1174
(CIT- 99-03-00151)

APPENDIX D

19 U.S.C. § 1466: Equipment and repairs of vessels

(a) Vessels subject to duty; penalties

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country. If the owner or master willfully or knowingly neglects or fails to report, make entry, and pay duties as herein required, or if he makes any false statement in respect of such purchases or repairs without reasonable cause to believe the truth of such statements, or aids or procures the making of any false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, such vessel, or a monetary amount up to the value thereof as determined by the Secretary, to be recovered from the owner, shall be subject to seizure and forfeiture. For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

(b) Notice

If the appropriate customs officer has reasonable cause to believe a violation has occurred and determines that further proceedings are warranted, he shall issue to the person concerned a written notice of his intention to issue a penalty claim. Such notice shall—

(1) describe the circumstances of the alleged violation;

(2) specify all laws and regulations allegedly violated;

(3) disclose all the material facts which establish the alleged violation;

(4) state the estimated loss of lawful duties, if any, and taking into account all of the circumstances, the amount of the proposed penalty; and

(5) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why such penalty claim should not be issued.

(c) Violation

After considering representations, if any, made by the person concerned pursuant to the notice issued under subsection (b) of this section, the appropriate customs officer shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. If such officer determines that there was no violation, he shall promptly notify, in writing, the person to whom the notice was sent. If such officer determines that there was a violation, he shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided under paragraphs (1) through (4) of subsection (b) of this section.

(d) Remission for necessary repairs

If the owner or master of such vessel furnishes good and sufficient evidence that—

(1) such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination;

(2) such equipments or parts thereof or repair parts or materials, were manufactured or produced in the United States, and the labor necessary to install such equipments or to make such repairs was performed by residents of the United States, or by members of the regular crew of such vessel; or

(3) such equipments, or parts thereof, or materials, or labor, were used as dunnage for cargo, or for the packing or shoring thereof, or in the erection of temporary bulkheads or other similar devices for the control of bulk cargo, or in the preparation (without permanent repair or alteration) of tanks for the carriage of liquid cargo; then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture, and no license or enrollment and license, or renewal of either, shall hereafter be issued to any such vessel until the collector to whom application is made for the same shall be satisfied, from the oath of the owner or master, that all such equipments or parts thereof or materials and repairs made within the year immediately preceding such application have been duly accounted for under the provisions of this section, and the duties accruing thereon duly paid; and if such owner or master shall refuse to take such oath, or take it falsely, the vessel shall be seized and forfeited.

(e) Exclusions for arrivals two or more years after last departure

(1) In the case of any vessel referred to in subsection (a) of this section that arrives in a port of the United States two years or more after its last departure from a port in the United States, the duties imposed by this section shall apply only with respect to—

(A) fish nets and netting, and

(B) other equipments and parts thereof, repair parts and materials purchased, or repairs made,

during the first six months after the last departure of such vessel from a port of the United States.

(2) If such vessel is designed and used primarily for transporting passengers or property, paragraph (1) shall not apply if the vessel departed from the United States for the sole purpose of obtaining such equipments, parts, materials, or repairs.

(f) Civil aircraft exception

The duty imposed under subsection (a) of this section shall not apply to the cost of equipments, or any part thereof, purchased, of repair parts or materials used, or of repairs made in a foreign country with respect to a United States civil aircraft, within the meaning of general note 3(c)(iv) of the Harmonized Tariff Schedule of the United States.

(g) Fish net and netting purchases and repairs

The duty imposed by subsection (a) of this section shall not apply to entries on and after October 1, 1979, and before January 1, 1982, of -

(1) tuna purse seine nets and netting which are equipments or parts thereof,

(2) repair parts for such nets and netting, or materials used in repairing such nets and netting, or

(3) the expenses of repairs of such nets and netting, for any United States documented tuna purse seine vessel of greater than 500 tons carrying capacity or any United States tuna purse seine vessel required to carry a certificate of inclusion under the general permit issued to the American Tunaboat Association pursuant to section 1374 of title 16.

(h) Foreign repair of vessels

The duty imposed by subsection (a) of this section shall not apply to—

(1) the cost of any equipment, or any part of equipment, purchased for, or the repair parts or materials to be used, or the expense of repairs made in a foreign country with respect to, LASH (Lighter Aboard Ship) barges documented under the laws of the United States and utilized as cargo containers,

(2) the cost of spare repair parts or materials (other than nets or nettings) which the owner or master of the vessel certifies are intended for use aboard a cargo vessel, documented under the laws of the United States and engaged in the foreign or coasting trade, for installation or use on such vessel, as needed, in the United States, at sea, or in a foreign country, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such spare part purchased in, or imported from, a foreign country, or

(3) the cost of spare parts necessarily installed before the first entry into the United States, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such spare part purchased in, or imported from, a foreign country.

(June 17, 1930, ch. 497, title IV, Sec. 466, 46 Stat. 719; Pub. L. 91-654, Sec. 1, Jan. 5, 1971, 84 Stat. 1944; Pub. L. 95-410, title II, Sec. 206, Oct. 3, 1978, 92 Stat. 900; Pub. L. 96-39, title VI, Sec. 601(a)(3), July 26, 1979, 93 Stat. 268; Pub. L. 96-467, Sec. 14(a)(3)(B), Oct. 17, 1980, 94 Stat. 2225; Pub. L. 96-609, title I, Sec. 115(a), Dec. 28, 1980, 94 Stat. 3558; Pub. L. 98-573, title II, Sec. 208, Oct. 30, 1984, 98 Stat. 2976; Pub. L. 100-418, title I, Sec. 1214(h)(4), Aug. 23, 1988, 102 Stat. 1157; Pub. L. 101-382, title III, Sec. 484E(a), Aug. 20, 1990, 104 Stat. 709; Pub. L. 103-465, title I, Sec. 112(b), Dec. 8, 1994, 108 Stat. 4825.)

APPENDIX E

19 C.F.R. § 4.14: Equipment purchases by, and repairs to, American vessels.

(a) General provisions and applicability. Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States, including repairs made while those vessels are on the high seas, are subject to declaration, entry and payment of ad valorem duty. This does not apply to reimbursement paid to members of the regular crew of a vessel for labor expended in making repairs to the vessel. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades under Customs interpretations. Duty is based on actual foreign cost. This includes the original foreign purchase price of articles which have been imported into the United States and are later sent abroad for use. For the purposes of this section, expenditures made in American Samoa, the Guantanamo Bay Naval Station, Guam, Puerto Rico, or the U.S. Virgin Islands are considered to have been made in the United States, and are not subject to declaration, entry or duty. Under separate provisions of law, the cost of labor performed, and of parts and materials produced and purchased in Israel are not subject to duty under the vessel repair statute. Additionally, expenditures made in Canada or in Mexico are not subject to any vessel repair duties. Even in the absence of any liability for duty, it is still required that all repairs and purchases, including those made in Canada, Mexico, and Israel, be declared and entered.

(b) Applicability to specific types of vessels.

(1) Fishing vessels. As provided in § 4.15, vessels documented under U.S. law with a fishery endorsement are subject to vessel repair duties for covered foreign expenditures. Undocumented American fishing vessels which are repaired, or for which parts, nets or equipment are purchased outside the U.S. are also liable for duty.

(2) Government-owned or chartered vessels. Vessels normally subject to the vessel repair statute because of documentation or intended use are not excused from duty liability merely because they are either owned or chartered by the U.S. Government.

(3) Vessels continuously away for two years or longer.

(i) Liability for expenditures throughout entire absence from U.S. Vessels that continuously remain outside the United States for two years or longer are liable for duty on any fish nets and netting purchased at any time during the entire absence. Vessels designed and used primarily for transporting passengers or merchandise, which depart the United States for the sole purpose of obtaining equipment, parts, materials or repairs remain fully liable for duty regardless of the duration of their absence from the United States.

(ii) Liability for expenditures made during first six months of absence. Except as provided in paragraph (b)(3)(i) of this section, vessels that continuously remain outside the United States for two years or longer are liable for duty only on those expenditures which are made during the first six months of their absence. See paragraph (h)(3) of this section. However, even though some costs might not be dutiable because of the six-month rule, all repairs, materials, parts and equipment-related expenditures must be declared and entered.

(c) Estimated duty deposit and bond requirements. Generally, the person authorized to submit a vessel repair declaration and entry must either deposit or transmit estimated duties or produce evidence of a bond on Customs Form 301 at the first United States port of arrival before the vessel will be permitted to depart from that port. A continuous or single entry bond of sufficient value to cover all potential duty on the foreign repairs and purchases must be identified by surety, number and amount on the vessel repair declaration which is submitted at the port of first arrival. At the time the vessel repair entry is submitted by the vessel operator to the appropriate VRU port of entry as defined in paragraph (g) of this section, that same identifying information must be identified on the entry form. Sufficiency of the amount of the bond is within the discretion of Customs at the arrival port with claims for reduction in duty liability necessarily being subject to full consideration of evidence by Customs. Customs officials at the port of arrival may consult the appropriate Vessel Repair Unit (VRU) port of entry as identified in paragraph (g) of this section or the staff of the Entry Procedures and Carriers Branch in Customs Headquarters in setting sufficient bond amounts. These duty, deposit, and bond requirements do not apply to vessels which are owned or chartered by the United States Government and are actually being operated by employees of an agency of the Government. If operated by a private party for a Federal agency under terms whereby that private party is liable under the contract for payment of the duty, there must be a deposit or a bond filed in an amount adequate to cover the estimated duty.

(d) Declaration required. When a vessel subject to this section first arrives in the United States following a foreign voyage, the owner, master, or authorized agent must submit a vessel repair declaration on Customs Form 226, a dual-use form used both for declaration and entry purposes, or must transmit its electronic equivalent. The declaration must be ready for

presentation in the event that a Customs officer boards the vessel. If no foreign repair-related expenses were incurred, that fact must be reported either on the declaration form or by approved electronic means. The Customs port of arrival receiving either a positive or negative vessel repair declaration or electronic equivalent will immediately forward it to the appropriate VRU port of entry as identified in paragraph (g) of this section.

(e) Entry required. The owner, master, or authorized representative of the owner of any vessel subject to this section for which a positive declaration has been filed must submit a vessel repair entry on Customs Form 226 or transmit its electronic equivalent. The entry must show all foreign voyage expenditures for equipment, parts of equipment, repair parts, materials and labor. The entry submission must indicate whether it provides a complete or incomplete account of covered expenditures. The entry must be presented or electronically transmitted by the vessel operator to the appropriate VRU port of entry as identified in paragraph (g) of this section, so that it is received within ten calendar days after arrival of the vessel. Claims for relief from duty should be made generally as part of the initial submission, and evidence must later be provided to support those claims. Failure to submit full supporting evidence of cost within stated time limits, including any extensions granted under this section, is considered to be a failure to enter.

(f) Time limit for submitting evidence of cost. A complete vessel repair entry must be supported by evidence showing the cost of each item entered. If the entry is incomplete when submitted, evidence to make it complete must be received by the appropriate VRU port of entry as identified in paragraph (g) of this section within 90 calendar days from the date of vessel arrival. That evidence must include either the final cost of repairs or, if the operator submits acceptable evidence that final cost information is not yet available, initial or interim cost estimates given prior to or after the work was authorized

by the operator. The proper VRU port of entry may grant one 30-day extension of time to submit final cost evidence if a satisfactory written explanation of the need for an extension is received before the expiration of the original 90-day submission period. All extensions will be issued in writing. Inadequate, vague, or open-ended requests will not be granted. Questions as to whether an extension should be granted may be referred to the Entry Procedures and Carriers Branch in Customs Headquarters by the VRU ports of entry. Any request for an extension beyond a 30-day grant issued by a VRU must be submitted through that unit to the Entry Procedures and Carriers Branch, Customs Headquarters. In the event that all cost evidence is not furnished within the specified time limit, or is of doubtful authenticity, the VRU may refer the matter to the Customs Office of Investigations to begin procedures to obtain the needed evidence. That office may also investigate the reason for a failure to file or for an untimely submission. Unexplained or unjustified delays in providing Customs with sufficient information to properly determine duty may result in penalty action as specified in paragraph (j) of this section. Extensions granted for the filing of necessary evidence may also extend the time for filing Applications for Relief (see paragraph (i)(1) of this section).

(g) Location and jurisdiction of vessel repair unit ports of entry. Vessel Repair Units (VRUs) are responsible for processing vessel repair entries. VRUs are located in New York, New York; New Orleans, Louisiana; and San Francisco, California. The New York unit processes vessel repair entries received from ports of arrival on the Great Lakes and the Atlantic Coast of the United States north of, but not including, those located in the State of Virginia. The New Orleans unit processes vessel repair entries received from ports of arrival on the Atlantic Coast from and including those in the State of Virginia, southward, and from all United States ports of arrival on the Gulf of Mexico including ports in Puerto Rico. The San Francisco unit processes vessel repair

entries received from all ports of entry on the Pacific Coast including those in Alaska and Hawaii.

(h) Justifications for relief from duty. Claims for relief from the assessment of vessel repair duties may be submitted to Customs. Relief may be sought under paragraphs (a), (d), (e), or (h) of the vessel repair statute (19 U.S.C. 1466(a), (d), (e), or (h)), each paragraph of which relates to a different type of claim as further specified in paragraphs (h)(1)-(h)(4) of this section.

(1) Relief under 19 U.S.C. 1466(a). Requests for relief from duty under 19 U.S.C. 1466(a) consist of claims that a foreign shipyard operation or expenditure is not considered to be a repair or purchase within the terms of the vessel repair statute or as determined under judicial or administrative interpretations. Example: a claim that the shipyard operation is a vessel modification.

(2) Relief from duty under 19 U.S.C. 1466(d). Requests for relief from duty under 19 U.S.C. 1466(d) consist of claims that a foreign shipyard operation or expenditure involves any of the following:

(i) Stress of weather or other casualty. Relief will be granted if good and sufficient evidence supports a finding that the vessel, while in the regular course of its voyage, was forced by stress of weather or other casualty, while outside the United States, to purchase such equipment or make those repairs as are necessary to secure the safety and seaworthiness of the vessel in order to enable it to reach its port of destination in the United States. For the purposes of this paragraph, a "casualty" does not include any purchase or repair made necessary by ordinary wear and tear, but does include the failure of a part to function if it is proven that the specific part was repaired, serviced, or replaced in the United States immediately before the start of the voyage in

question, and then failed within six months of that date.

(ii) U.S. parts installed by regular crew or residents. Relief will be granted if equipment, parts of equipment, repair parts, or materials used on a vessel were manufactured or produced in the United States and were purchased in the United States by the owner of the vessel. It is required under the statute that residents of the United States or members of the regular crew of the vessel perform any necessary labor in connection with such installations.

(iii) Dunnage. Relief will be granted if any equipment, equipment parts, materials, or labor were used for the purpose of providing dunnage for the packing or shoring of cargo, for erecting temporary bulkheads or other similar devices for the control of bulk cargo, or for temporarily preparing tanks for carrying liquid cargoes.

(3) Relief under 19 U.S.C. 1466(e). Requests for relief from duty under 19 U.S.C. 1466(e) relate in pertinent part to matters involving vessels normally subject to the vessel repair statute, but that continuously remain outside the United States for two years or longer. Vessels that continuously remain outside the United States for two years or longer may qualify for relief from duty on expenditures made later than the first six months of their absence. See paragraph (b)(3)(ii) of this section.

(4) Relief under 19 U.S.C. 1466(h). Requests for relief from duty under 19 U.S.C. 1466(h) consist of claims that a foreign shipyard operation or expenditure involves any of the following:

(i) Expenditures on LASH barges. Relief will be granted with respect to the cost of equipment, parts,

materials, or repair labor for Lighter Aboard Ship (LASH) operations accomplished abroad.

(ii) Certain spare repair parts or materials. Relief will be granted with respect to the cost of spare repair parts or materials which are certified by the vessel owner or master to be for use on a cargo vessel, but only if duty was previously paid under the appropriate commodity classification(s) as found in the Harmonized Tariff Schedule of the United States when the article first entered the United States.

(iii) Certain spare parts necessarily installed on a vessel prior to their first entry into the United States. Relief will be granted with respect to the cost of spare parts only, which have been necessarily installed prior to their first entry into the United States with duty payment under the appropriate commodity classification(s) as found in the Harmonized Tariff Schedule of the United States.

(i) General procedures for seeking relief.

(1) Applications for Relief. Relief from the assessment of vessel repair duty will not be granted unless an Application for Relief is filed with Customs. Relief will not be granted based merely upon a claim for relief made at the time of entry under paragraph (e) of this section. The filing of an Application for Relief is not required, nor is one required to be presented in any particular format, but if filed it must clearly present the legal basis for granting relief, as specified in paragraph (h) of this section. An Application must also state that all repair operations performed aboard a vessel during the one-year period prior to the current submission have been declared and entered. A valid Application is required to be supported by complete evidence as detailed in paragraphs (i)(1)(i)-(vi) and (i)(2) of this

section. Except as further provided in this paragraph, the deadline for receipt of an Application and supporting evidence is 90 calendar days from the date that the vessel first arrived in the United States following foreign operations. The provisions for extension of the period for filing required evidence in support of an entry, as set forth in paragraph (f) of this section, are applicable to extension of the time period for filing Applications for Relief as well. Applications must be addressed and submitted by the vessel operator to the appropriate VRU port of entry and will be decided in that unit. The VRUs may seek the advice of the Entry Procedures and Carriers Branch in Customs Headquarters with regard to any specific item or issue which has not been addressed by clear precedent. If no Application is filed or if a submission which does not meet the minimal standards of an Application for Relief is received, the duty amount will be determined without regard to any potential claims for relief from duty (see paragraph (h) of this section). Each Application for Relief must include copies of:

(i) Itemized bills, receipts, and invoices for items shown in paragraph (e) of this section. The cost of items for which a request for relief is made must be segregated from the cost of the other items listed in the vessel repair entry;

(ii) Photocopies of relevant parts of vessel logs, as well as of any classification society reports which detail damage and remedies;

(iii) A certification by the senior officer with personal knowledge of all relevant circumstances relating to casualty damage (time, place, cause, and nature of damage);

(iv) A certification by the senior officer with personal knowledge of all relevant circumstances

relating to foreign repair expenditures (time, place, and nature of purchases and work performed);

(v) A certification by the master that casualty-related expenditures were necessary to ensure the safety and seaworthiness of the vessel in reaching its United States port of destination; and

(vi) Any permits or other documents filed with or issued by any United States Government agency other than Customs regarding the operation of the vessel that are relevant to the request for relief.

(2) Additional evidence. In addition, copies of any other evidence and documents the applicant may wish to provide as evidentiary support may be submitted. Elements of applications which are not supported by required evidentiary elements will be considered fully dutiable. All documents submitted must be certified by the master, owner, or authorized corporate officer to be originals or copies of originals, and if in a foreign language, they must be accompanied by an English translation, certified by the translator to be accurate. Upon receipt of an Application for Relief by the VRU within the prescribed time limits, a determination of duties owed will be made. After a decision is made on an Application for Relief by a VRU, the applicant will be notified of the right to protest any adverse decision.

(3) Administrative protest. Following the determination of duty owing on a vessel repair entry, a protest may be filed under 19 U.S.C. 1514(a)(2) as the only and final administrative appeal. The procedures and time limits applicable to protests filed in connection with vessel repair entries are the same as those provided in part 174 of this chapter. In particular, the applicable protest period will begin on the date of the issuance of the decision giving rise to the protest as reflected on the relevant correspondence from the appropriate VRU.

(j) Penalties.—

(1) Failure to report, enter, or pay duty. It is a violation of the vessel repair statute if the owner or master of a vessel subject to this section willfully or knowingly neglects or fails to report, make entry, and pay duties as required; makes any false statements regarding purchases or repairs described in this section without reasonable cause to believe the truth of the statements; or aids or procures any false statements regarding any material matter without reasonable cause to believe the truth of the statement. If a violation occurs, the vessel, its tackle, apparel, and furniture, or a monetary amount up to their value as determined by Customs, is subject to seizure and forfeiture and is recoverable from the owner (see § 162.72 of this chapter).

(2) False declaration. If any person required to file a vessel repair declaration or entry under this section, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any materially false, fictitious or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement, that person will be subject to the criminal penalties provided for in 18 U.S.C. 1001.

[T.D. 80-237, 45 FR 64565, Sept. 30, 1980, as amended by T.D. 82-227, 47 FR 54065, Dec. 1, 1982; T.D. 83-214, 48 FR 46511, Oct. 13, 1983; T.D. 84-149, 49 FR 28698, July 16, 1984; T.D. 84-213, 49 FR 41163, Oct. 19, 1984; T.D. 85-123, 50 FR 29952, July 23, 1985; T.D. 91-77, 56 FR 46114, Sept. 10, 1991; T.D. 93-57, 58 FR 39655, July 26, 1993; 58 FR 44128, 44130, Aug. 19, 1993; T.D. 94-41, 59 FR 18481, April 19, 1994; T.D. 95-77, 60 FR 50010, Sept. 27, 1995; T.D. 95- 78, 60 FR 50021, 50022, Sept. 27, 1995; T.D. 99-27, 64 FR 13674, 13675, March 22, 1999; T.D. 01-24, 66 FR 16397, March 26, 2001]

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No. 04-206

In the Supreme Court of the United States

SL SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the federal duty on "expenses of repairs" performed in foreign shipyards on vessels documented in the United States applies to expenses simultaneously incurred due to both dutiable and non-dutiable work.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 357 F.3d 1358. The opinion of the United States Court of International Trade (Pet. App. 13a-21a) is reported at 244 F. Supp. 2d 1359.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2004. A petition for rehearing was denied on April 12, 2004. On July 1, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 10, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1866, Congress has imposed a 50% *ad valorem* duty on "the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States." 19 U.S.C. 1466(a).[1] Congress later explained that it sought to "protect American labor," out of concern that imports "should not come into this country to the detriment of the American producers and wage earners." H.R. Rep. No. 7, 71st Cong., 1st Sess. 3, 4 (1929).

Congress has exempted some repair expenses from the duty under specified circumstances. For example, the Secretary of the Treasury may remit the duty if a "vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and * * * make such repairs, to secure the safety and seaworthiness of the vessel." 19 U.S.C. 1466(d)(1). In addition, "compensation paid to members of the regular crew of such vessel in connection with * * * the making of repairs, in a foreign country, shall not be included in the cost of * * * such repairs." 19 U.S.C. 1466(a).

2. Until 1994, the Customs Service (Customs) generally construed the term "expenses of repairs" to include only those expenses "directly involved" in the

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[1] 19 U.S.C. 1466(a) states in pertinent part:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

repairs, such as costs of parts and labor. Customs generally did not impose a duty on costs of docking a vessel during repairs.

In 1994, the Federal Circuit determined, in interpreting Section 1466(a), that "the language 'expenses of repairs' is broad and unqualified," and therefore covers "all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred." *Texaco Marine Servs., Inc.* v. *United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994). "Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." *Ibid.*

Following the Federal Circuit's decision, the Customs Service announced that it would subsequently treat docking-related charges—including crane, dry docking, electricity, travel, transportation, launch, lodging, security, and staging—as dutiable costs under Section 1466(a), to the extent they were incurred in connection with dutiable repairs. Memorandum from Stuart P. Seidel, Assistant Comm'r, U.S. Customs Office of Regulations & Rulings, to the New Orleans Regional Director, Commercial Ops. Div. (Jan. 18, 1995), *available at* 1995 WL 64779.

3. In November and December 1995, the *Sea-Land Pacific*, a ship owned by petitioner SL Service, dry docked at the Hong Kong United Dockyards for the purpose of obtaining both dutiable repairs and non-dutiable inspections and modifications. Pet. App. 1a-2a. Pursuant to normal industry practice, petitioner decided months in advance to have dutiable and non-dutiable work done at the same time. See C.A. App. 44-46, 51. Petitioner undertook dutiable repairs that required dry docking during all or nearly all of the time the ship

remained in dry dock. See, *e.g.*, *id.* at 837 (SL Service record indicating that preparing and painting the hull lasted virtually the entire length of the dry docking); *id.* at 842 (SL Service record indicating that preparing and painting the hull was dutiable work that required dry docking).

When the *Sea-Land Pacific* returned to the United States two weeks later, Customs imposed the Section 1446(a) duty on repair expenses. In so doing, it noted that there was a "mixed justification" for the dry docking costs, in that petitioner dry docked the vessel for both dutiable and non-dutiable work. C.A. App. 105. Pursuant to its longstanding practice with other mixed-purpose expenses, Customs apportioned the costs of dry docking between the dutiable and non-dutiable work. *Ibid.* Customs assessed a total duty of $295,221; according to petitioner, $12,542 (approximately 4%) of that amount is attributable to dry docking expenses. See Pet. 10.

4. Petitioner SL Service filed this action in the Court of International Trade, contending that none of the "mixed-purpose" dry docking expenses should have been assessed with duties because petitioner allegedly would not have incurred them "but for" the non-dutiable inspections. Petitioner also argued that Section 1466(a) prohibits Customs from apportioning such expenses.

The Court of International Trade ruled that, while apportionment of dry docking expenses is proper under Section 1466(a), Customs' methodology is arbitrary, capricious, and contrary to law. Pet. App. 13a-21a. The court held that "only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/or modifi-

cations are dutiable under the *Texaco* test." *Id.* at 19a-20a.

5. The court of appeals reversed. Pet. App. 1a-12a. The court explained that "*Texaco* dealt with single-purpose expenses [*i.e.*, those incurred solely because of dutiable repairs] while the dry-docking of the Sea-Land Pacific was a dual-purpose expense." *Id.* at 4a. "As such, the 'but for' test, which was formulated for classification of single-purpose expenses, is inapplicable." *Ibid.* After considering common law authorities on causation, the court of appeals concluded that "the dry-docking was equally *caused* by both the non-dutiable and dutiable work," and "just as the tortfeasor in concurrent causation cases is held responsible for the harm he causes, it is rational to consider the dry-docking an 'expense of repairs.'" *Id.* at 7a.

After concluding that the dry docking was a dutiable "expense of repairs," the court of appeals held that "it is rational to impose the duty only on that portion of the expense that is fairly attributable to the dutiable repairs." Pet. App. 7a. "Indeed, to impose the 50% *ad valorem* duty on the entire cost of dry-docking in this case would exceed the mandate of the statute." *Ibid.* Thus, "Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense." *Id.* at 8a.

Judge Bryson dissented. Pet. App. 10a-12a. He determined that the dry docking expenses were not dutiable under the "but for" test because they were incurred for non-dutiable "inspection and maintenance purposes as well as for repairs, and thus the expenses would have been incurred even without the occurrence of the dutiable repair work." *Id.* at 10a. Judge Bryson also

concluded that Customs' apportionment methodology "finds no support in the vessel repair statute," which "offers no guidance as to how such an apportionment should be conducted." *Id.* at 12a.

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any court of appeals. Further review is not warranted.

1. a. Petitioner contends that dry docking cannot be an "expense of repairs" when it is necessitated by something other than dutiable repairs. As petitioner conceded in the court of appeals, however (Appellee C.A. Br. 29 n.16), "[s]ome, but not all of the repair work required dry-docking." Thus, the dry docking was a necessary "expense of repairs."

Although petitioner frequently invokes the "plain language" of the statute (Pet. 13, 15-16, 17), petitioner does not (and can not) identify any statutory text even suggesting that an expense *required* to undertake a repair is anything other than an "expense of repair." Petitioner's argument that "[t]he statute contemplates that an expense either is or is not a dutiable expense of repair" (Pet. 18) sheds no new light on the problem: as the Federal Circuit held, the dry docking at issue here is a dutiable "expense of repairs" precisely because it was required by dutiable repairs and no exception applies. Pet. App. 7a.

b. Petitioner also errs in arguing that the Federal Circuit "abandoned the *Texaco* 'but for' test as the generally applicable plain-language interpretation of the statutory phrase 'expenses of repairs.'" Pet. 15. Rather than "abandon[ing]" the "but for" test, the Federal Circuit simply found it "inapplicable" on the facts of this case. Pet. App. 4a. In *Texaco*, the Federal Circuit

determined that "cleaning performed subsequent to dutiable repairs" and "work associated with protective coverings used during dutiable repairs" were "expenses of repairs" because "they would not have been incurred 'but for' dutiable repairs." *Ibid.* (quoting *Texaco*, 44 F.3d at 1541). As the Federal Circuit explained (*id.* at 4a):

> The most obvious difference between the facts here and those in *Texaco* is that *Texaco* dealt with single-purpose expenses while the dry-docking of the Sea-Land Pacific was a dual-purpose expense. As such, the "but for" test, which was formulated for classification of single-purpose expenses, is inapplicable.

In drawing this distinction, the Federal Circuit had good company: the common law has long recognized that the but-for test "fails," and "some other test is needed," in concurrent-cause situations. William Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984); see Restatement (Third) of Torts: Liability for Physical Harm § 27, cmt. b (Tentative Draft No. 2, 2002) ("Courts and scholars have long recognized the problem of overdetermined harms—harms produced by multiple sufficient causes—and the inadequacy of the but-for standard for this situation."). Far from conflicting with one another, the decisions in *Texaco* and this case complement one another in the same way that different common law doctrines of causation complement one another: costs are covered by the duty if they were necessitated solely by dutiable repairs (as in *Texaco*), and are apportioned if they were necessitated by both dutiable and non-dutiable work (as here). See Pet. App. 6a-7a.

Any other reading would conflict with *Texaco*'s reasoning. *Texaco* construed Section 1466(a) broadly,

according to its terms, to *expand* the category of costs traditionally considered to be "expenses of repairs." See *Texaco*, 44 F.3d at 1544. Under petitioner's reading, however, *Texaco* would have opened a massive loophole by enabling ship owners to evade the duty by undertaking dutiable and non-dutiable work at the same time. Nothing in *Texaco* reflects such a self-defeating intent.[2]

c. Petitioner also contends (Pet. 16) that "the repairs did not 'cause' the foreign dry-docking, or any part of it," because "it was undisputed that the reason the ship was dry-docked abroad was to comply with federal inspection mandates." That contention is incorrect.

Petitioner conceded below that "[a]s soon as a ship completes one dry-docking, the ship begins a file of work to be accomplished at the next docking." C.A. App. 51. Indeed, "ship owners and operators know months in advance of a dry-docking most of the repairs that will be made," and "solicit competitive bids from ship repair yards in advance of a scheduled dry-docking to obtain the best prices for the repair work." *Id.* at 44-45; see *id.* at 51. Thus, the record does not support petitioner's contention that the *Sea-Land Pacific* entered dry dock

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[2] Nor is the decision below in conflict with *Sea-Land Service, Inc.* v. *United States*, 239 F.3d 1366 (Fed. Cir.), cert. denied, 533 U.S. 931 (2001), which addressed only the procedural question whether Customs should undertake a notice-and-comment proceeding, or *United States* v. *George Hall Coal Co.*, 134 F. 1003 (S.D.N.Y. 1905), aff'd, 142 F. 1039 (2d Cir. 1906) (per curiam), which, as the Federal Circuit noted, "addressed a jurisdictional question only. There were no findings with respect to the dutiability of dry-docking." Pet. App. 6a. While petitioner is correct that Customs did not generally collect a duty on docking expenses before the Federal Circuit decided *Texaco*, that change was occasioned by *Texaco*, not the decision below, and petitioner has not challenged *Texaco* in this Court or the court of appeals. Instead, petitioner has always *relied* on *Texaco* as the basis for its challenge to the duty imposed in this case.

solely for non-dutiable reasons; instead, the record demonstrates that ships enter dry dock for purposes of *both* dutiable and non-dutiable work. See Pet. App. 1a-2a. The court of appeals correctly relied on that fact as a premise for its decision. *Ibid.* (noting that the vessel "was dry-docked at the Hongkong [*sic*] United Dockyards *for the purpose of obtaining* * * * required inspections and modifications, which are non-dutiable, in addition to *dutiable repairs*") (emphases added); see *id.* at 4a ("the dry-docking of the Sea-Land Pacific was a dual-purpose expense").

Petitioner attempts to evade those facts by speculating that if the *Sea-Land Pacific* had not undergone inspection in Hong Kong in November and December 1995, it might have undertaken the repairs—which petitioner concedes were needed—at a different time or place. Pet. 10, 17. That speculation is unsupported by the record, and is irrelevant in any event. Regardless of the initial motivation for scheduling the dry dock in Hong Kong, petitioner chose to make dutiable repairs in Hong Kong that required dry docking. At the time the vessel was in dry dock, and was incurring dry dock charges, it was simultaneously incurring those charges for both dutiable and non-dutiable work. Thus, the dry docking charges were expenses of repairs. Cf. Restatement (Third) of Torts: Liability for Physical Harm § 27, cmt. e (Tentative Draft No. 2, 2002) (concurrent cause principles apply to events "operating and sufficient to cause the harm contemporaneously").

d. Petitioner's contrary arguments exalt form over substance in such a way as to undermine congressional intent. If petitioner had its way, ship owners could defeat the applicable portion of the duty by initially identifying only non-dutiable work as the reason for dry

docking, and later scheduling all of their needed dutiable repairs for the same docking. Indeed, ship owners could avoid *ever* paying duties on dry docking costs associated with dutiable repairs by always undertaking dutiable and non-dutiable work at the same time.

Petitioner unabashedly endorses that result, arguing that such an evasion of Section 1466 is fully consistent with congressional intent because it would save ship owners from the supposed "Hobson's choice" of paying the duty or having their ships repaired in the United States. Pet. 22 n.12. That curious argument stands congressional intent on its head: Congress enacted Section 1466 precisely in order to encourage ship owners to utilize American shipyards. Thus, the imposition of a financial cost for dry docking in a foreign shipyard, instead of undertaking repairs in an American shipyard, is the very *purpose* of the statute, not an unfortunate side effect of the court of appeals' ruling, as petitioner would have it. See H.R. Rep. No. 7, *supra*, at 3, 4 (explaining that Congress sought to "protect American labor," out of concern that imports "should not come into this country to the detriment of the American producers and wage earners").[3]

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[3] *South Corp.* v. *United States*, 690 F.2d 1368, 1372 (Fed. Cir. 1982) ("Congress sought to protect and encourage American ship repair facilities."); *Mount Wash. Tanker Co.* v. *United States*, 665 F.2d 340, 344 (C.C.P.A. 1981) (explaining that duty serves "to equalize * * * relative costs of repairs performed by foreign versus domestic labor, in order to encourage U.S. shipowners to employ U.S. labor whenever possible"); *Sea-Land Serv., Inc.* v. *United States*, 683 F. Supp. 1404, 1409 (Ct. Int'l Trade 1988) ("It is evident from the legislative history * * * that the basic purpose of the foreign repair statute was to protect American labor."); *Erie Navigation Co.* v. *United States*, 475 F. Supp. 160, 163 (Cust. Ct. 1979) ("It is clear that the purpose of section 1466(a) was to protect the American shipbuilding and

Petitioner counters (Pet. 23) that the merchant fleet is now in dire economic straits, and American shipyards are too busy and expensive for private cargo vessels. Those factual assertions are unproven conjecture: petitioner neither raised them below nor adduced any record evidence in support of them. In any event, the alleged state of the merchant marine in 2004 is irrelevant to the interpretation of the plain language of a statute enacted in 1866 to protect American shipyards. Petitioner's complaints are appropriately addressed to Congress, not the courts.[4]

2. a. In addition to contesting the imposition of a duty on multi-purpose expenses, petitioner challenges Customs' decision to apportion such expenses between dutiable and non-dutiable work (Pet. 19). The basis for that challenge is not clear. Petitioner notes that Section 1466 does not expressly reference apportionment, but petitioner does not identify any alternative to apportionment (short of exempting the relevant expenses from duty altogether). Because the dry docking expenses are "expenses of repairs" subject to the duty, Customs' only conceivable options were to impose a duty on the full

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repairing industry."); *United States* v. *Gissel*, 353 F. Supp. 768, 772 (S.D. Tex. 1973) (noting that "it was Congressional policy to encourage the obtaining of American flag vessel repairs in American shipyards"), aff'd, 493 F.2d 27 (5th Cir.), cert. denied, 419 U.S. 1012 (1974).

[4] Congress has exempted only one category of multi-purpose expenses from the duty: "compensation paid to members of the regular crew of such vessel in connection with * * * the making of repairs, in a foreign country." 19 U.S.C. 1466(a). Congress has also enacted an exemption for situations in which a ship cannot safely return to the United States. 19 U.S.C. 1466(d)(1). But it has never enacted an exemption for expenses incurred abroad simply because the vessel owner found it less expensive to use a foreign shipyard rather than a shipyard in the United States.

amount or to apportion equitably. Faced with this choice, Customs reasonably chose the option that benefitted petitioner.

Petitioner asserts (Pet. 19) that the court of appeals erred in deferring to Customs' apportionment methodology because, until *Texaco*, Customs historically did not impose any duty on docking expenses. That argument misses the point. The court of appeals held apportionment to be reasonable without regard to deference, in light of the statutory text and the equities, and by analogy to tort law. Pet. App. 7a. When the court of appeals went on to consider the apportionment methodology adopted by Customs, it had no reason to consider the treatment of docking-related expenses before *Texaco*, because the question of apportionment of such expenses did not arise in the pre-*Texaco* era. The relevant past practice, which the court of appeals correctly considered, is Customs' 40-year-old practice of employing apportionment in an analogous, mixed-purpose context in which Customs has long considered one of the purposes to be subject to duty. *Id.* at 8a-9a; C.A. App. 258, 273-274, 276, 284.

b. In addition to challenging the concept of apportionment, petitioner takes issue with two aspects of the apportionment methodology employed by the Customs Service (Pet. 19-21). Those claims are not encompassed in the question presented, which asks only whether the duty applies, not how the duty should be calculated. See Pet. (i); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-537 (1992). Petitioner also refrained from raising those claims in the court of appeals, and the court did not address them. This Court does not ordinarily grant a petition for a writ of certiorari to review claims that were

neither pressed nor passed upon below. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if those claims were properly presented, they would not warrant this Court's review. The particulars of Customs' methodology do not run afoul of Section 1466, which, as petitioner notes, "offers no guidance as to how such an apportionment should be conducted." Pet. 19 (quoting Pet. App. 12a (Bryson, J., dissenting)). Petitioner contends that apportionment should be based only on the costs of repairs that required dry docking, as opposed to the costs of all repairs (*id.* at 19-20), but all of the repairs were in fact performed in dry dock. Petitioner also notes that as the ratio of dutiable to non-dutiable work rises, the percentage of docking costs subject to duty rises in direct proportion (*id.* at 20-21), but there is nothing irrational about that result. In any event, the court of appeals had no occasion to consider those claims because petitioner did not present them below.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

SL SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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REPLY BRIEF

The petition demonstrates that the ruling below is at odds with the plain language of the vessel repair statute, arbitrarily departs from decades of administrative and judicial precedent, undermines longstanding federal policy, and endangers an industry critical to the nation's security. Respondent either ignores or sidesteps each of these points.

1. Respondent does not dispute, or even engage, petitioner's showings that the U.S.-flag merchant fleet serves vital national security functions, and that the fleet is in deep trouble and can scarcely afford the substantial increase in operating expenses that the Federal Circuit's ruling will cause. Pet. 2-6, 22-23. Respondent instead tries to discount petitioner's showings as "unproven conjecture" without support in the record. Opp. 11. That response is deeply misguided. For one thing, petitioner's showing depended largely on the Government's own documents. See, *e.g.*, Pet. 2-5 & n.1. For another, questions about the importance of a case, for purposes of this Court's decision whether to grant review, almost never appear in the record; certainly they cannot be waived or forfeited, as respondent suggests. Respondent's dismissive treatment of the real-world backdrop of this case thus is both disingenuous and inapposite.

Respondent does not and cannot deny that the ruling below will harm a vital industry that is already against the ropes, at a time when the nation can ill afford it. Even with ballooning budgets, military resources are stretched taut. The Defense Department cannot begin to supply the vessels or the manpower for the massive cargo movements required by current and prospective military engagements, a task taken up chiefly by the U.S.-flag fleet—this on top of the broader economic importance of the merchant marine. In this light, surely the serious adverse impact of the ruling below warrants this Court's review.

2. The petition explains at length why the ruling below is arbitrary and contrary to the plain language of the vessel repair statute. Pet. 17-22. None of respondent's rejoinders withstands scrutiny.

a. Begin with the common ground. Respondent concedes that the decision below is inconsistent with the body of practice and precedent ending only a decade ago. Until the Federal Circuit's 1994 *Texaco* ruling, "expenses of repairs" was construed in accord with its commonsense meaning: "those expenses 'directly involved' in the repairs, such as costs of parts and labor." Opp. 2-3. Thus, it is undisputed that the decision below is at odds with a century or more of administrative practice and judicial construction.

There is no ambiguity as to what constitutes "expenses of repair." The expenses of general service, drydocking, inspection, repair, maintenance, and modification are readily segregable. Indeed, the Customs Service has no problem identifying what constitutes an expense of repair. However, instead of imposing duties only on those expenses, as the statute commands, the Customs Service (with the blessing of the Federal Circuit) also uses those expenses as the numerator in a formula to assign certain other expenses to the "repair" category and thus impose massive duties upon them. As Judge Bryson pointed out, nothing in the statute authorizes apportionment of nonrepair expenses to the dutiable "expense[s] of repair." Pet. App. 12a (Bryson, J., dissenting). Indeed, it would have been passing strange for Congress to impose an elaborate apportionment scheme when it enacted the vessel repair statute in 1866, when the size and scope of the federal government were a fraction of what they are today.

Not only is the decision below contrary to the plain meaning of the statute, but the Federal Circuit has now given the simple term "expenses of repair" mutually inconsistent meanings depending on the expenses at issue. The court below left in place the rule of *Texaco* (which itself was a de-

parture from precedent) for what it deemed single-purpose expenses. Under *Texaco Marine Servs., Inc.* v. *United States*, duties are imposed on expenses "which, but for dutiable repair work, would not have been incurred," but are not imposed on "expenses that would have been incurred even without the occurrence of dutiable repair work." 44 F.3d 1539, 1544 (Fed. Cir. 1994); see Pet. App. 4a, 10a. The latter describes exactly the drydocking expenses here. Because the PACIFIC had to be placed in dry dock to conduct the required inspections, the expenses would have been incurred even without the occurrence of dutiable repairs. Conversely, the clean-up expenses at issue in *Texaco* (see 44 F.3d at 1541-42), which were held dutiable under the but-for test, would not have been dutiable under the newfangled test announced below because they were not "required" in order to perform the repair. Pet. App. 7a. Respondents never explain how a single statutory phrase "expenses of repair" can have mutually exclusive meanings when applied in different contexts.

b. Respondent's efforts to square the circle and reconcile the holding below with *Texaco* and with the statutory language are unpersuasive. First, the contention that *Texaco* applies only to "'single-purpose expenses,'" Opp. 7 (quoting Pet. App. 4a), is belied by *Texaco* itself, which on its face dealt with dual-purpose expenses. With regard to the clean-up expenses that were at issue in that case, the court stated that "'but for' dutiable repairs, the clean-up work, *at least in part*, would not have been required"—indicating that the clean-up work was occasioned by both dutiable repairs and other causes. *Texaco*, 44 F.3d at 1548 (emphasis added); see also *id.* at 1548 n.9 ("it appears that some cleaning of the cargo tanks to prepare them to carry cargo would have been necessary even if the repairs had not been made"). Thus the costs at issue in *Texaco* were not, as respondent asserts (Opp. 7), "necessitated solely by dutiable repairs."

Second, respondents' claim that the decision below simply refines the *Texaco* standard by borrowing a "concurrent-

caus[ation]" standard from tort law is flawed. Opp. 7-8. As an initial matter, tort concepts of causation have never (prior to *Texaco*) been applied to customs duties; in customs law, "the question is not whether and how to compensate the victim of a wrong." Pet. App. 11a (Bryson, J., dissenting). More fundamentally, the test that the Federal Circuit applied here—whether drydocking is "required" in order to perform the repairs that were made to the *PACIFIC*, *id.* at 7a—is not a causation test (concurrent or otherwise). As petitioner has explained (Pet. 16), the drydocking was "caused" by mandatory Coast Guard and ABS inspections. The inspections were the reason the ship docked in Hong Kong, and the record shows that the ship remained in dry dock for only as long as the inspections took. That the owner took the opportunity to make repairs while the ship was out of commission does not change the purpose of the drydocking. There is no evidence that these were urgent repairs; they could as well have been undertaken during another docking at another port.[1]

An analogy illustrates the point. A car owner takes her car to a certified service station for a mandatory inspection, and then decides to have the brake pads replaced since the car will be in the shop anyway. Even though the car must be in the service station to have the brake pads replaced, that ancillary task did not *cause* the car owner to go to the station; the inspection mandate did. Similarly, a hull repair that SL Service decided to have done while the *PACIFIC* was in dry dock did not *cause* the ship to dock in Hong Kong in November 1995.

In other words, if the assessment of duty on drydocking and related expenses really turns on causation, then it must be predicated on a showing of *actual* cause-in-fact. Cf. W.P.

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[1] Respondent dismisses this as "speculation" without support in the record. Opp. 9. But there is no finding on the record as to concurrent causation because that was not the test applied by the Court of International Trade (which applied *Texaco* but-for causation), or by the Customs Service or the Federal Circuit.

Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263-65 (5th ed. 1984). That is, there must be a finding of fact that (on the facts of this case) the *PACIFIC*, even if it were not undergoing Coast Guard and ABS inspections, would nonetheless have docked in a foreign port during that same voyage in order to make these repairs. By the same token, if a vessel docked for dutiable repairs also undertakes nondutiable modifications, there would have to be findings as to whether the modifications would have been performed under different circumstances.

In short, the Federal Circuit did not announce (and the Customs Service does not apply) a cause-in-fact test. Rather, the Federal Circuit has given the simple phrase "expense of repairs" in a venerable statute a new, muddled, and mutually contradictory interpretation that varies with the expenses at issue, meaning "but-for cause" of the repair in one circumstance and "necessary condition" of the repair in another. The only unifying thread in the decision below is to maximize Customs revenues in every case by capturing all expenses associated with repairs. Such an outcome is antithetical to the statute, and particularly unwarranted given that Congress recently rejected the Customs Service's entreaty to broaden the vessel repair statute to impose duties on "'all costs and expenses associated with'" overseas repairs. Pet. 9. Customs's proposal for amendment betrays its recognition that the vessel repair statute does not reach expenses of this kind, and Customs should not be able to achieve through the courts a change that Congress has denied.

c. Respondent's other objections lack force. Petitioner discussed the illogical apportionment method employed in this case, Pet. 19-21, to illustrate the inherent arbitrariness and unworkability of the ruling below. Respondent's back-of-the-hand answer that these points "were neither pressed nor passed upon below," Opp. 12-13, is off the mark. Petitioner is not, as in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), asking this Court to pass on issues not raised in the

lower courts. See *id.* at 147 n.2, *cited at* Opp. 13. Petitioner merely showed how the rule announced by the panel below would play out on the ground. Neither *Adickes* nor any other precedent to petitioner's knowledge suggests this Court will or should ignore the real-world implications of a challenged ruling in deciding whether the ruling warrants further review.

And respondent fails to engage petitioner's showing in this regard. Respondent asserts conclusorily that "there is nothing irrational" about a rule under which "as the ratio of dutiable to nondutiable work rises, the percentage of docking costs subject to duty rises in direct proportion." But beneath this facile formulation the rule is indeed irrational, and irremediably so. As petitioner explained, Pet. 20-21, the duty on drydocking can vary substantially as a function of costs that have no relation to the dutiable work, and no relation to the time or the facilities required for drydocking. Similarly, the Federal Circuit's rule figures the duty on drydocking based partly on work that does not require drydocking. *Id.* at 19-20. Thus, the rule calls for assessment of a drydocking duty that is partially divorced from both the fact of drydocking and the fact of dutiable work.

The rule adopted below is, in other words, merely a new revenue-raising device with little more than a nominal footing in the repair statute. It is arbitrary as a matter of statutory construction and is internally inconsistent. Respondent has not shown otherwise.

4. Finally, respondent's discussion of the deterrent purpose of the vessel repair statute, Opp. 9-11, misses the mark. Respondent emphasizes that the statute was designed to encourage the use of U.S. shipyards for vessel repairs. *Id.* at 10 & n.3. That is true (see Pet. 7-8), but the observation does not advance the ball. That a statute has a deterrent element does not make it a one-way ratchet, such that all increases in liability further the statute and bounds on liability defeat it. Neither the statutory language nor any indicium of Congressional intent supports imposition of the vessel repair duty on

the cost of docking a vessel incident to ABS inspections and modifications. Indeed, the vessel repair statute has always represented a balancing of interests. Congress has consistently taken care to protect the fleet's interests of the U.S.-flag fleet, both by mitigating the impact of the vessel repair statute and by other ameliorative legislation. *Id.* at 5-6, 8-9, 21-22. The Customs Service until very recently refused to read the vessel repair statute expansively to cover dry docking. An expansion in the expenses subject to duty may deter,[2] but not in service of the statute.

Second, it is reasonable to ask what is being deterred. The vessel repair statute aims to deter shipowners from going overseas to have repairs done—not to deter them from having *inspections* done overseas. (It cannot have the latter purpose, as costs inspection costs are nondutiable.) As both petitioner and respondent have noted, economic realities dictate that a cargo ship be taken out of service as seldom as possible; consequently, it is not only customary but necessary that U.S.-flag vessel operators schedule repairs and other work to coincide with drydockings required for Coast Guard and ABS inspections. *Id.* at 6; Opp. 8-9. Therefore, if the repair statute is construed to impose duty on costs incidental to inspections, the only way a ship operator can avoid the duty is to have the inspections done in U.S. ports. That is not in most cases an available option to ship operators, and it is not a goal of the vessel repair statute.

For the same reason, respondent's leitmotif of duty "evasion" and "defeat[ing]" the repair statute (Opp. 8, 9, 10) is misplaced. Merchant vessels are expressly allowed, without penalty, to undergo inspections (as well as modifications) in foreign shipyards. It is hardly evasive, then, for a ship owner faced with a mandatory inspection to solicit bids from various yards along the ship's route and select the best bid for the job.

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[2] In reality, it generally will not deter, but will only add another fixed cost to ocean transport. *See* Pet. 23.

To have necessary repairs made at the same time is not a bait-and-switch, see *id.* at 9-10, but a business necessity, as respondent concedes. If Congress wishes to tax the costs of ABS and Coast Guard inspections undertaken overseas, it may do so. It has not done so.

Finally, respondent's protestation that this dispute is "appropriately addressed to Congress, not the courts," *id.* at 11, is misplaced. That can be said of any issue of statutory interpretation that is brought to this Court. In any event, respondent has it backward. It was not Congress, but a divided appeals court panel, that vastly expanded the reach of the vessel repair statute. The Federal Circuit should not be able to rewrite in arbitrary ways a federal statute that is of enormous importance to the merchant marine industry, in the face of established practice and contrary legislative intent.

The split ruling below has wrought a change in the law that, if let to stand, will have serious and broad effects on a vital industry. To do so, the panel overruled the well-reasoned decision of a specialized court—the U.S. Court of International Trade—with expertise in trade and tariff matters, which had faithfully applied the Federal Circuit's own decision in *Texaco*. Moreover, the Federal Circuit's exclusive appellate jurisdiction precludes other courts' weighing in. (Thus the absence of a circuit split, see *id.* at 6, far from calling for denial of the petition, militates in favor of a grant.) This Court is the only forum for the re-examination that this case demands.

CONCLUSION

For these reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

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IN THE

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SL SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICI CURIAE* OF HORIZON LINES, LLC; AMERICAN OCEAN ENTERPRISES, INC.; AMERICAN ROLL ON ROLL OFF CARRIER, LLC; AMERICAN SHIPPING GROUP; CENTRAL GULF LINES, INC.; MATSON NAVIGATION COMPANY, INC.; TECO OCEAN SHIPPING; THE TRANSPORTATION INSTITUTE; AND WATERMAN STEAMSHIP CORP.

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Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of Regulations & Rulings, to New Orleans Regional Director (Jan. 18, 1995), *available at* 1995 WL 64779 10-11

BRIEF *AMICUS CURIAE*

On written consent of all parties pursuant to Rule 37.3(a), Horizon Lines, LLC, American Ocean Enterprises, Inc., American Roll On Roll Off Carrier, LLC, American Shipping Group, Central Gulf Lines, Inc., Matson Navigation Company, Inc., Teco Ocean Shipping, the Transportation Institute and Waterman Steamship Corp. (the "industry representatives" or "*Amici*") respectfully submit this brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit made by SL Service, Inc.[1]

INTERESTS OF *AMICI CURIAE*

Horizon Lines, LLC ("Horizon") is the nation's leading Jones Act container shipping and logistics company, accounting for approximately 37% of total U.S. marine container shipments from the continental United States to Alaska, Puerto Rico, and Hawaii/Guam, the three major non-contiguous Jones Act markets. Under the Jones Act, 46 U.S.C. App. § 883 (2000), enacted in 1920, domestic U.S.-maritime trade is restricted to U.S.-owners of U.S.-built and flagged vessels manned by predominantly U.S. citizen crews.

Horizon operates the largest Jones Act containership fleet with 16 vessels and approximately 21,700 cargo containers of varying specifications, and provides comprehensive shipping and logistics services in these markets. Typically, 15 of Horizon's vessels are actively deployed at any given time, with one spare vessel reserved for relief while another undergoes U.S. Government-required periodic inspections, generally requiring dry-docking. Having a spare ship

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* customs counsel, Williams Mullen, which is also co-counsel for the petitioner, co-authored this brief.

allows Horizon to offer continuity of service, critical to its customers.

All of Horizon's vessels are regulated or classed by the United States Coast Guard ("USCG") and the American Bureau of Shipping ("ABS"), which together impose and enforce rigorous inspection criteria. Horizon's vessels are maintained according to its own strict maintenance guidelines, which meet or exceed U.S. governmental requirements. Horizon's careful maintenance procedures protect and preserve its fleet to the highest standards in the industry.

Horizon has dry-docked 34 vessels since December of 1999. It sends requests for bids along with a detailed specification to a minimum of six shipyards, in the United States as well as foreign shipyards in the vicinity of the vessel's routes. Horizon will often switch ships between services to obtain the most beneficial location and scheduling for the dry-dockings. The present disparity in bid cost and projected completion time between U.S. and foreign shipyards often results in the work being done in foreign shipyards. Horizon has been working with several U.S. yards to reduce those disparities.

American Ocean Enterprises ("AEO") is the parent of American International Car Carrier, Inc. ("AICC"), which operates three U.S.-flag car carrier vessels under time charter to American Roll On Roll Off Carrier, LLC ("ARC"). Operating in foreign commerce between Europe and the U.S. east coast, these ships undergo ship repair in foreign shipyards. The decision in this case thus affects AOE as well as ARC.

American Shipping Group and its subsidiaries are privately held U.S. corporations that own and operate seven U.S.-built, U.S.-flag commercial cargo vessels qualified to operate in Jones Act trades. Currently, two vessels are serving Alaska, two are serving Puerto Rico, one is chartered into service to

Hawaii and two are chartered to the United States military. Several of these vessels have been repaired in foreign shipyards in the past, and any or all of them could be repaired in foreign shipyards in the future.

Central Gulf Lines, Inc. ("Central Gulf") and Waterman Steamship Corp. ("Waterman") are U.S. citizen owned and controlled companies that own and operate numerous U.S.-flag commercial vessels in the foreign trade of the United States. Central Gulf and Waterman strongly oppose the imposition of duties under 19 U.S.C. § 1466 upon dry-docking, general service and other non-vessel repair expenses incurred for work performed on their U.S.-flag vessels that is otherwise required by the U.S. Coast Guard or appropriate vessel classification societies. The onerous duties are not authorized by the statute for such non-repair work, and they adversely affect the competitiveness of Central Gulf, Waterman and other U.S.-flag commercial vessel owners and operators engaged in the U.S. foreign trade.

Matson Navigation Company, Inc. is a Hawaii corporation and is a principal Jones Act carrier in the Hawaii and Guam trades. Matson is a wholly-owned subsidiary of Alexander & Baldwin, Inc., a Hawaii corporation. Matson currently owns or operates 13 ships, four barges and one integrated tug-barge and has also provided rail, highway, air, ocean and other surface transportation and other third-party logistics services for North American shippers. Under its current vessel schedule configuration Matson has deployed nine ships and three barges in the Hawaii trade, one barge in the Mid-Pacific trade, and three ships in the Guam Pacific trade, and two ships are in lay-up. All of the vessels are U.S.-flag vessels, and the ships are manned by U.S. citizen crews. The U.S. Coast Guard administers and regulates the international and flag state requirements for Matson's vessels. ABS is the classification society for all of Matson vessels. Matson's vessels are subject to regular inspection and drydocking as

well as a preventive maintenance program. The vessels periodically undergo repairs and modifications in both U.S. shipyards and foreign facilities. Since 2000, Matson's owned or operated vessels have been repaired, been modified or had scheduled drydockings in foreign shipyards 16 times.

Teco Ocean Shipping ("TOS") operates a fleet of 11 U.S.-flag vessels and ocean-going integrated tug and barge units ranging in size from 19,200 deadweight ton ("dwt") to over 40,000 dwt. TOS has been in business with U.S.-flag vessels since 1959 and is primarily in the dry bulk coastwise trades of the United States. TOS regularly drydocks in Asia, the Mediterranean and Latin America and will continue to do so into the foreseeable future.

The Transportation Institute is a Washington, D.C.-based non-profit organization dedicated to maritime research, education and promotion. The Institute supports a wide range of programs that promote the strength of America's marine transportation capability.

STATEMENT

Required Regulatory Inspections

U.S. flag commercial vessel operators are subject to numerous regulations, the most important of which are USCG and ABS.[2] These bodies have been regulating, by rule and by on-site inspection, the design specifics, construction and on-going operation and testing of *Amici's* vessels. Non-compliance with USCG and ABS rules and regulations would

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[2] U.S. flag vessels are required to undergo regular inspections by the USCG and ABS. See 46 C.F.R. §§ 2.01-10(b), 90.05-1(a), 91.01-1 (Oct. 1, 2003). According to U.S. Coast Guard regulations, these inspections must occur at least two times in a five-year period, with no more than three years elapsing between any two examinations. *See id.* § 91.40-3 (Oct. 1, 2003). This usually requires dry-docking of the vessel, taking the vessel out of service for two weeks or more. *Id.*

result in the vessel not being able to operate. USCG compliance is required by law. ABS compliance is necessary to obtain insurance.

The on-site inspection/survey, as was involved with the SEA-LAND PACIFIC in this case, would normally require vessels owned or operated by *Amici* to be put in dry-dock for a thorough inspection of the entire exterior hull, rudders, anchors and propeller shafts, most of which can be inspected only when the vessel is high and dry. Additional inspections always done at the time of dry-dock include internal inspections of major components in the propulsion system such as propulsion boilers, propulsion turbines, condensers for the propulsion steam, etc. These inspections are performed coincidentally with USCG and ABS inspections while the ship is in dry-dock since the propulsion plant cannot be run while in dry-dock. The dry-dock period provides the time to inspect the internals of these units.

By way of example, USCG attends approximately 10 percent of Horizon Lines' vessels' inspections because Horizon uses the optional Alternate Compliance Program. Under this program, USCG has delegated much of its inspection authority to the ABS to save USCG time and to reduce duplication of inspections. ABS inspections almost always take place while the ship is in dry-dock. Most major shipyards have provided offices to ABS inspectors/surveyors to make on-site inspection more efficient for ABS as well as the ship operators.

Because of the high cost of dry-docking a large cargo ship and the substantial cost in having a ship out of service, most ship owners or operators will arrange for necessary non-emergency repairs and modifications to be performed at the same time when the ship is in dry-dock for USCG and ABS inspections.

The Vessel Repair Statute

The federal vessel repair statute imposes a 50 percent duty on the cost of repairs made in foreign countries on U.S.-flag vessels. The statute provides in pertinent part that

> . . . the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (2001).

The Bureau of Customs and Border Protection ("Customs") has detailed regulations, 19 C.F.R. § 4.14 (Apr. 1, 2004), for the assessment and collection of duties under the vessel repair statute. Customs requires the vessel operator to declare and enter all costs associated with foreign shipyard work, whether or not dutiable. Typically, the entry submitted by a Customs Form ("CF") 226 is accompanied with a spreadsheet listing hundreds of line items detailing the specific work and characterizing each individual item as dutiable or not.[3] Each item must be accompanied by an invoice from the shipyard. Sometimes, it takes weeks or even months to obtain these invoices, requiring the vessel operator to obtain extensions of time from Customs to submit such evidence of cost in support of the vessel operator's application for relief. *See* 19 C.F.R. § 4.14 (f) and (i) (Apr. 1, 2004). Needless to say, these regulatory requirements, intended to allow Customs to determine dutiability of the

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[3] For example, all expenditures made at shipyards must be declared and entered on the CF 226, even if subject to a free trade agreement such as the North American Free Trade Agreement ("NAFTA"). 19 C.F.R. § 4.14(a).

specific item of work, impose a tremendous additional burden on U.S.-flag ocean carriers and operators.

When the vessel repair entry is submitted as complete, Customs reviews each line item to determine whether Customs views the specific expense as a dutiable "expense of repair" or as subject to specific statutory duty exemptions. The vessel owner or operator may then disagree with Customs' finding by filing an administrative protest under 19 C.F.R. Part 174 (Apr. 1, 2004); *see also* 19 U.S.C. § 1514(a)(2) (2001) *and* 19 C.F.R. § 4.14(i)(3) (Apr. 1, 2004). If the protest is denied, a summons may be filed with U.S. Court of International Trade as was done with the SEA-LAND PACIFIC. 28 U.S.C. § 1581 (2001).

REASONS FOR GRANTING THE PETITION

In 1994, the Federal Circuit in *Texaco* interpreted the statutory phrase

> 'expenses of repairs' as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work.

Texaco Marine Services, Inc. v. United States ("Texaco"), 44 F.3d 1539, 1544 (Fed. Cir. 1994). This decision enunciated what has became known as the "but-for" test within the industry and by Customs. The Federal Circuit in *Texaco* found the statute to be "clear" and not "ambiguous" and the language to be "broad and unqualified." *Id.* Yet now, the Federal Circuit, reversing a decision by the U.S. Court of International Trade ("USCIT"), has articulated a different standard, which as a matter of law and common sense clashes with the "but-for" test. Its new "dual purpose" interpretation stretches the statute even farther beyond repair-related expenses. The statute is limited for a reason—to strike a

balance between the interests of U.S. shipyards and U.S.-flag carriers and operators. The Federal Circuit's decision here upsets that balance and harms U.S.-flag carriers.

The decision below is arbitrary and is inconsistent with that court's own decision in *Texaco,* harming *Amici's* companies, which operate in a highly competitive environment. The Federal Circuit's new "interpretation" of the vessel repair statute not only departs from the plain language of the statute but also conflicts with the Federal Circuit's own interpretation just a decade ago in *Texaco*. Further, contrary to the intent of Congress, it allows Customs to arbitrarily impose duties on work done abroad on U.S.-flag vessels.

The industry opposed the expansive view of the statute espoused by the Government in *Texaco*. However, the industry has adjusted to the *Texaco* "but-for" approach. The Federal Circuit now expands the statutory term even farther to impose duties on any expense incurred in a foreign shipyard, whether repair-related or not, by imposing a modified "but-for" test for so-called "dual purpose" or "mixed justification" expenses. The Federal Circuit's decision has in effect blessed Customs' rewrite of the vessel repair statute to impose duties on any item of work done in a foreign shipyard even though the Federal Circuit lacks authority to do so. The statute imposes duties not on all costs incurred in shipyards abroad but only upon "expenses of repairs." That was the apparent reason for the Federal Circuit's original "but-for" test in *Texaco*. The Federal Circuit's novel construction, based upon common law tort doctrine, allows Customs to impose the hefty 50 percent duty where it was not intended by Congress. This harms U.S.-flag carriers. It deprives U.S.-flag carriers and operators of the carefully constructed limitations of the vessel repair duty created by Congress in 19 U.S.C. § 1466 (2001).

Moreover, it is disturbing to our industry that the issues raised by this case will not be further examined in other lower

courts because the Federal Circuit has exclusive appellate jurisdiction of cases involving disputes over customs duties, *see* 28 U.S.C. §§ 1295(a)(5), 1581(a) *and* (b) (2001). As such, the Federal Circuit's adoption of Customs' arbitrary duty assessment cannot be corrected absent a reversal by this Court.

We concur with and adopt by reference herein the legal arguments for review made by Petitioner SL Service.[4] We submit this Brief to illustrate the impact of the Federal Circuit's decision on U.S.-flag ocean carriers.

I. THE INHERENTLY INCONSISTENT INTERPRETATIONS BY THE FEDERAL CIRCUIT IN *TEXACO* AND *SL SERVICE* CREATE CONFUSION IN IMPLEMENTING AND ADMINISTERING THE VESSEL REPAIR STATUTE AND THEREFORE REQUIRE THIS COURT'S INTERVENTION

A. The Federal Circuit's Decision Calls into Question Its Earlier Interpretation of "Expenses of Repairs" in *Texaco*

Prior to the Federal Circuit's decision in *Texaco*, Customs took the position in its administrative rulings that the vessel repair statute imposed duties only on the cost of foreign repairs themselves, *i.e.*, on "expenditures made for foreign materials or for foreign labor employed in making repairs." T.D. 39443, 43 Treas. Dec. Int. Rev. 99, 100 (1923). Expenses incidental to repair work were not considered by Customs to be subject to duty under the statute. *See, e.g.*, *Mount Washington Tanker Co.* v. *United States*, 505 F. Supp. 209, 216 (Ct. Int'l Trade 1980) (cost of transporting workers

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[4] American Shipping Group concurs with and adopts by reference herein only the legal arguments for review made by Petitioner SL Service in Part I of its Petition for a Writ of Certiorari.

to perform repairs not dutiable), *aff'd*, 665 F.2d 340, 345 (C.C.P.A. 1981); *International Navigation Co.* v. *United States*, 148 F. Supp. 448, 455 (Cust. Ct. 1957) (cost of transporting men and materials for repair work not dutiable); *American Viking Corp.* v. *United States*, 150 F. Supp. 746, 752 (Cust. Ct. 1956) (cost of lighting necessary to perform repairs not dutiable). In addition, the cost of dry-docking a ship in a foreign shipyard was long held to be non-dutiable. *United States v. George Hall Coal Co.,* 134 F.1003, 1003 (S.D.N.Y. 1905), *aff'd,* 142 F. 1039, 1039 (2d Cir. 1906).

In *Texaco*, the Federal Circuit interpreted the statutory phrase "expenses of repairs" more broadly as covering expenses incidental to dutiable repairs. Specifically, the *Texaco* court approved the imposition of duties on the costs of protective coverings used in preparation for repairs and of cleaning up after the repairs, reasoning as a matter of plain language "expenses of repairs" should be construed "as covering all expenses . . . which, but for dutiable repair work, would not have been incurred." 44 F.3d at 1541-42. The Federal Circuit in *Texaco* found the statute to be "clear" and not "ambiguous" as well as "broad and unqualified," overruling the *Mount Washington*, *International Navigation*, and *American Viking* cases, *see Texaco* at 1544 *and* 1546-47, but leaving *George Hall Coal* intact, stating that the "but for" test was consistent with the *George Hall Coal* decision covering a dry-docking expense, which it interpreted as "stand[ing] for the proposition that expenses that would have been incurred irrespective of whether or not dutiable repairs are performed are not dutiable as an expense of repairs." *Id.* at 1546.

As a result of *Texaco*, a wide range of expenses previously considered non-dutiable by Customs (such as dry-docking, air, crane, dry-docking charges, electricity, travel/transportation, launch use, lodging, security and staging) were brought within the scope of the statute by utilization of *Texaco's* "but-for" test. *See* Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of

Regulations & Rulings, to New Orleans Regional Director, Commercial Operations Division (Jan. 18, 1995), *available at* 1995 WL 64779, as clarified by Memorandum from Stuart P. Seidel, Assistant Commissioner, U.S. Customs Office of Regulations & Rulings, to New Orleans Regional Director Commercial Operations Division (March 3, 1995), *available at* 1995 WL 156403.

While acknowledging the applicability of the *Texaco* "but-for" test to dry-docking and related services such as transportation, towing, pilotage, rigging, staging and crane use, Customs at the same time created another category of expense "in circumstances in which a mixed justification for dry docking is present." Jt. App. 100-105. For these "mixed-purpose" expenses, Customs imposed duty on the dry-docking and general services expenses by apportioning duties between the dutiable and non-dutiable work performed during the dry-docking period.[5] This is the method of duty assessment challenged by SL Service as contravening the vessel repair statute and the *Texaco* "but-for" test.

A divided Federal Circuit just a decade later stunned the industry in reversing the decision of the USCIT and ignoring the plain meaning of the statutory phrase "expenses of

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[5] According to the Declaration of Glen E. Vereb, Attorney-Advisor in the Entry Procedures and Carrier Branch, Office of Regulations & Rulings ("OR&R"), "[p]ro rata apportionment works in the following manner. For purposes of explanation, assume an entry has a total value of $1,100,000 covering all expenses, of which $100,000 represents dry-docking and general services. This amount is subtracted from the total amount of the entry leaving $1,000,000. Of this remaining amount, $600,000 represents dutiable expenses of repairs (60% of $1,000,000) and $400,000 represents non-dutiable expenses (40% of $1,000,000). Factoring the 60/40 ratio into the dry-docking and general services charges, apportionment results in $60,000 in dutiable dry-docking and general services costs and $40,000 in non-dutiable dry-docking costs. Thus the total amount of dutiable repairs for this entry is $660,000." Jt. App. 76-78.

repairs" and the *Texaco* "but for" test and approving Customs' novel duty assessment based upon apportionment. The majority below, not expressly overruling *Texaco* or a later case applying *Texaco*, *Sea-Land Service, Inc.* v. *United States*, 239 F.3d 1366 (Fed. Cir. 2001), reasoned that "[t]he precedential force of *Texaco* applies only to single-purpose expenses," finding that if dry-docking has "dual" purposes then Customs is entitled to apportion expenses between nondutiable work and dutiable repairs. Instead of relying on traditional statutory construction, as reflected by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) and its progeny, the Federal Circuit took the unusual approach of using common law tort doctrine as applied to multiple tortfeasors to justify its deviation from the statute and the court's earlier decision in *Texaco*.

Such analysis has no place in interpreting a duty or tax statute enacted to promote certain policy objectives. As noted by Judge Bryson in his dissent, "[i]n the context of the vessel repair statute . . . the question is not whether and how to compensate the victim of a wrong. Congress has determined that a duty of 50 percent on foreign repairs is the appropriate amount to protect the American shipbuilding industry from foreign competition; the question before us is simply whether, in determining how to calculate that 50 percent duty, a particular expense should be attributed to the cost of repairs. And the answer to that question is best given by the formula set forth in *Texaco*: that the expense is not an expense of repair if it 'would have been incurred irrespective of whether or not dutiable repairs were preformed.' 44 F.3d at 1546." App. 11a-12a.

The result of the panel majority disregarding the limits of the statute and its earlier decision in *Texaco* exposes U.S.-flag owners and operators to substantial duty liability for expenses

that would have been incurred whether or not a dutiable repair were performed.[6]

B. The Federal Circuit's Ruling Is Arbitrary

The Federal Circuit itself in *Texaco* found the statute to be clear and unambiguous covering expenses that would not have been incurred but for the repair (regardless of whether they were required by that repair). 44 F.3d at 1546. The majority, however, permitted allocation without causation; *i.e.*, the court sanctioned an accounting approach without requiring any link between the dry-docking and associated expenses and the repairs themselves. In the *SL Service* case, there was no showing by the Government that the specific repair items required dry-docking. *See* Spreadsheet identifying whether the particular item of work required or did not require dry-docking and associated services. Jt. App. 838-852. In fact, in many cases the repairs did not require dry-docking. Under the formulaic approach taken by Customs

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[6] The ruling affects a wide range of expenses in addition to the cost of dry-docking itself. As Customs has noted, in a rulemaking dealing with the vessel repair statute:

> Drydocking is a major, but not isolated, expense in general ship repair operations. Many other associated expenses and services are necessary adjuncts to drydocking and are logically inseparable from the drydocking rule. These include such items as drydock block arrangement, sea water supply (for firefighting equipment), hose hook-up and disconnection charges, fire watch services, the services of a crane for drydocking-related operations, the provision of compressed air, cleaning of the drydock following repairs, among numerous others. These necessary services are costly, are supplied at nearly each drydocking, and had until recently been considered to be classifiable as duty-free.

Foreign Repairs to American Vessels, 66 Fed. Reg. 16,392, 16,393 (Mar. 26, 2001). Now all such expenses are subject to the vessel repair duty, even if the ship was in dry-dock by reason of nondutiable work or mandatory inspections if repairs are performed during the dry-dock period.

wherein repairs, modifications and inspections occur simultaneously the dry-docking and general services expenses would always be subject to duty. This would be the case whether or not the charges would have been incurred irrespective of the occurrence of repair work. Imposition of duties under such circumstances is without basis in law and thus arbitrary on the part of Customs.

U.S.-flag vessel owners and operators regularly place their ships in dry-dock to comply with USCG and ABS mandatory inspections. Because of the substantial costs associated with taking a ship out of service to comply with such legal requirements, the vessel operators/owners arrange for other work during this period where the vessel is out of service. The dry-dock and associated general service expenses are driven by non-dutiable inspections and are incurred irrespective of the repair work. Such expenses cannot be construed as necessarily required "but-for" repairs. Just because the repair is performed during the dry-docking does not mean the repair required dry-docking and related services. Indeed, for the SEA-LAND PACIFIC the repairs in many cases did not require dry-docking at all. Jt. App. 838-852.

In the case of the SEA-LAND PACIFIC, the U.S. Court of International Trade properly found that "only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/ or modifications are dutiable under the *Texaco* test." *Am. Ship Mgmt., LLC v. United States*, 162 F.Supp.2d 671, 675 (Ct. Int'l Trade 2001). Thus, if the dry-docking were to extend beyond the period necessary to perform mandatory inspections we would not dispute the imposition of vessel repair duties under the "but-for" test for the additional time because those services were necessitated by the repair work and not driven by the mandatory inspections or other non-dutiable work such as a modification. As such, these charges are repair expenses under the statute and the "but-for" test. That is not the case where the dry-docking is compelled by

mandatory USCG and ABS requirements and the period of dry-docking did not exceed the period of time necessary to perform these mandatory inspections except under the arbitrary and illogical ruling being appealed here.

The statute contemplates that an expense either is or is not a dutiable "expense of repair." Congress did not provide for an "apportionment" of expenses between dutiable and non-dutiable categories or for a partial assessment of duties. The Federal Circuit's approval of Customs' capricious apportionment methodology, as Judge Bryson pointed out, "finds no support in the vessel repair statute." App. 12a (Bryson, J., dissenting). It is noteworthy that Congress has provided for apportionment and partial duty assessment in other tariff laws.[7] In this case, Congress made no provision for partial duty assessment but imposed duties only upon "expenses of repairs." If Congress intended to provide for apportionment under 19 U.S.C. § 1466(a) it would have done so in clear and unambiguous language.

II. THE FEDERAL CIRCUIT'S RULING HARMS THE U.S. MERCHANT FLEET

If allowed to stand unreviewed, the decision below will have serious deleterious effects on the U.S.-flag fleet. Periodic dry-docking is required by USCG regulations and ABS requirements. Shipyard dry-docking and overhaul constitute one of the largest expense items in a cargo vessel's operating budget. Since vessel operators need to have repairs done virtually every time one of their vessels is in dry dock, the duty assessment rule announced by Customs and ap-

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[7] For example, in 19 U.S.C. § 1401a(b)(1)(C) (2001), Congress provides that for "assists," the amount to be added to arrive at "transaction value" is the value "apportioned as appropriate, of any assist." Congress has also provided for partial assessment of duties under subheadings 9802.00.40 and 9802.00.80, Harmonized Tariff Schedule of the United States, which assess "a duty on the value of repairs or alterations" rather than duty on the total value of the article.

proved by the Federal Circuit will have a significant negative financial impact on U.S.-flag operators.

The impact of *Texaco* and now the Federal Circuit's decision in *SL Service* on apportionment represents an ever increasing financial burden on U.S.-flag vessel operators. U.S.-flag operating costs are already significantly higher than those for foreign flag operators.

III. CONCLUSION

The decision below has no basis in the statute but, in a strained effort to support Customs' further imposition of duties, instead resorts to an unconventional analysis based upon common law tort doctrine to expand the parameters of the statute. As such, the decision sanctions an arbitrary ruling by Customs to impose duties on services where none was provided by Congress. The court decision is also inconsistent with the Federal Circuit's own "but-for" interpretation in *Texaco*, thereby likely leading to further confusion in administration of the vessel repair statute. Finally, the decision, if not reviewed, will result in a further onerous financial burden placed only on U.S.-flag vessel operators by their own government, which can only serve to benefit their non-U.S. citizen competitors. For these reasons, the decision of the divided panel should be reviewed by this Court.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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